

10-19-2010

McCann v. McCann Clerk's Record v. 4 Dckt. 37547

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In the
SUPREME COURT
of the
STATE OF IDAHO

Ronald R. Mc Cann,

Plaintiff/Appellant,

v.

William V. Mc Cann, Jr., et al,

Defendants-Respondents,

Mc Cann Ranch & Livestock Company, Inc.,

Nominal Defendant-Respondent.



CLERK'S RECORD ON APPEAL
Volume IV

Appealed from the District Court of the Second
Judicial District of the State of Idaho, in and
for Nez Perce County

Honorable George D. Carey, District Judge

Supreme Court No. 37547

Attorney for Plaintiff
Timothy Esser

Attorney for Defendant
Merlyn W. Clark

37547

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. MC CANN,)	
)	
Plaintiff-Appellant,)	SUPREME COURT NO. 37547
)	
v.)	
)	TABLE OF CONTENTS
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director of McCann Ranch &)	
Livestock Company, and as a)	
shareholder of McCann Ranch &)	
Livestock, Inc., in his capacity)	
of the William V. McCann, Sr.)	
Stock Trust,)	
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)	
MC CANN RANCH & LIVESTOCK COMPANY,)	
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)	
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
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RONALD R. MC CANN,)	
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)	
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FILED

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PATTY D. WEEKS
CLERK OF THE DIST. COURT
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DEPUTY

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)	
	)	Case No. CV 08-01226
Plaintiff,)	
vs.	)	MOTION FOR PROTECTIVE ORDER
)	
WILLIAM V. McCANN, JR., and)	
GARY E. MEISNER,)	
)	
Defendants.)	
)	
McCANN RANCH & LIVESTOCK)	
COMPANY, INC.,)	
)	
Nominal Defendant.)	
)	

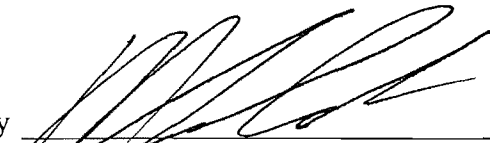
Defendant William V. McCann, Jr., by and through his counsel of record Hawley Troxell Ennis & Hawley, LLP, moves the Court, pursuant to I.R.C.P. 26(c), for a protective order limiting discovery to events and transaction occurring after January 5, 2001, the date on which Plaintiff's prior lawsuit against Defendants was dismissed.

This motion is supported by a supporting memorandum and the affidavit of Merlyn W. Clark, filed concurrently herewith.

DATED THIS 13th day of August, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Merlyn W. Clark, ISB No. 1026
Attorneys for Defendant William V.
McCann, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2009, I caused to be served a true copy of the foregoing MOTION FOR PROTECTIVE ORDER by the method indicated below, and addressed to each of the following:

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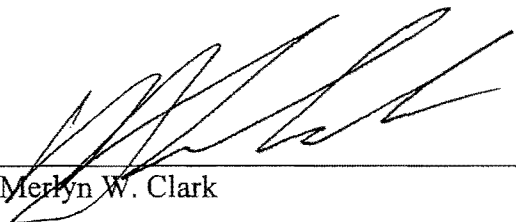
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Merlyn W. Clark

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Attorneys for Defendant William V. McCann, Jr.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and
GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK
COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER
AND IN OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL

Defendant William V. McCann, Jr., submits this memorandum in support of his Motion
for Protective Order and in opposition to Plaintiff's Motion to Compel.

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND IN
OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL - 1

615

I. INTRODUCTION

This Court has previously issued an order concluding that responses to Plaintiff's first set of discovery (both interrogatories and requests for production of documents) could be limited to events and transactions occurring after January 5, 2001, the date on which Plaintiff's prior lawsuit against the same Defendants named in this litigation was dismissed in its entirety. Despite this prior ruling on discovery, Plaintiff continues to demand pre-2001 documents. Defendants respectfully request an order limiting discovery to events and transactions occurring after January 5, 2001.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case involves a dispute that is in its second round through the courts. In 2000, Plaintiff, a shareholder in the McCann Ranch & Livestock Company, Inc. (the "Corporation") filed an action in Nez Perce County District Court, Case No. CV-00-01111 (*McCann I*), naming as defendants two directors of the Corporation, William V. McCann, Jr. and Gary E. Meisner (the "Director Defendants"). Plaintiff's 2000 lawsuit alleged a variety of causes of action against the Director Defendants. *See* Complaint filed in *McCann I* (the "*McCann I* Complaint"), ¶¶ 4.1 - 8.7 (attached as Exhibit 1 to Defendants' Memorandum in Support of Motion to Dismiss). An Amended Complaint filed by Plaintiff asserted the same causes of action as the original Complaint and included a variety of allegations against William V. McCann, Jr. and Gary E. Meisner, including: (1) that the Board was paying Gertrude McCann (the mother of Ronald McCann and William McCann, Jr.) an annual consultation fee; (2) that William V. McCann, Jr.'s \$144,000 salary was excessive; and (3) that Ronald McCann had been removed as a director of the Corporation. *See McCann I* Amended Complaint (Exhibit 2 to Memorandum in Support of

Motion to Dismiss); *see also McCann I* District Court Opinion, pp. 2-5 (Exhibit 4 to Memorandum in Support of Motion to Dismiss).

The District Court dismissed the *McCann I* Complaint for failure to comply with the written demand requirement set forth in I.C. § 30-1-742. *Id.* On November 1, 2000, Plaintiff filed a Supplemental Memorandum In Support Of Plaintiff's Motion to Amend Complaint, which attached a proposed Amended Complaint (Exhibit 3 to Memorandum in Support of Motion to Dismiss). Plaintiff's proposed Amended Complaint prayed for judicial dissolution pursuant to Idaho Code § 30-1-1430 due to alleged shareholder oppression. *Id.* at ¶ 5 to Prayer for Relief.

The District Court ultimately dismissed the *McCann I* Complaint with prejudice and held that Plaintiff would not be allowed to file any amended complaint. *See* January 5, 2001 Opinion and Order, p. 8. The Opinion and Order was affirmed by the Idaho Supreme Court. *See McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002) ("*McCann I*").

Six years later, Plaintiff again brought suit against the Corporation, as well as William V. McCann, Jr. and Gary E. Meisner as directors of the Corporation (*McCann II*). The *McCann II* Amended Complaint asserted two causes of action, each of which was asserted in the *McCann I* complaint and proposed amended complaint: (1) a breach of fiduciary duty cause of action against William V. McCann, Jr. and Gary E. Meisner as directors of the Corporation; and (2) an action for judicial dissolution of the Corporation pursuant to I.C. § 30-1-1430.

In a March 4, 2009 Order, this Court dismissed Plaintiff's first cause of action for failure to comply with the written demand requirement set forth in I.C. § 30-1-742. The only claim now remaining is Plaintiff's cause of action for judicial dissolution of the Corporation pursuant to I.C. § 30-1-1430. In recognition that this is the second in a series of lawsuits containing virtually

identical factual allegations, the Court indicated that it would consider only facts subsequent to January 5, 2001, the date on which the District Court dismissed *McCann I*. See March 4, 2009 Order, p. 7 (“In addressing the new claims on the merits, the court anticipates that it will be considering events that took place after January 5, 2001.”).

Consistent with this recognition that the court would be “considering events that took place after January 5, 2001,” the Court issued a separate order limiting Plaintiff’s First Set of Discovery requests to documents and information after January 5, 2001. For example, Plaintiff’s first set of discovery sought information and documents going back to 1997. The following discovery requests are illustrative:

REQUEST FOR PRODUCTION NO. 1: Produce all correspondence generated since January 1, 1997 between you and: 1) Gertrude McCann; 2) McCann Ranch & Livestock Co.; 3) Gary Meisner; and 4) James Schoff, and by correspondence, we mean emails, facsimile transmissions, letters, communications of any nature.

INTERROGATORY NO. 1: Detail all financial transactions between the corporation and Gertrude McCann since January 1, 1997 through the present.

REQUEST FOR PRODUCTION NO. 2: Produce all documents that refer to, evidence, explain or are otherwise relevant to each financial transaction between the corporation and Gertrude McCann since 1997, including:

- a) Schedules and any other documents from tax returns.
- b) Correspondence between the corporation and Gertrude McCann, including correspondence between the directors and Gertrude McCann.
- c) Ledgers, account statements, leases, purchase and sale documents, payments made on behalf of Gertrude McCann.

d) Minutes of any meeting at which transactions with Mrs. McCann were discussed.

See Affidavit of Merlyn W. Clark, filed concurrently herewith ("Clark Affidavit"), Exhibits A-B (emphasis added).

The Defendants objected to Plaintiff's discovery requests to the extent that they went back prior to the conclusion of the *McCann I* litigation. The Court issued a March 5, 2009 Memorandum and Order Concerning Discovery in which the Court ordered that the Defendants' responses to Plaintiff's first set of discovery could be limited to documents and information "since January 5, 2001 (the date on which *McCann I* was dismissed)". See Memorandum and Order Concerning Discovery, p. 2.

Despite the Court's order limiting the Defendants' responses to the first set of discovery to information and documents after January 5, 2001, the Plaintiff has continued to serve discovery requests seeking pre-2001 documents. For example, in his second set of discovery to the Corporation, Plaintiff requested:

REQUEST FOR PRODUCTION NO. 6: Financial Records: We request the following financial records:

- (a) Trial balances for the **1996 through 2007** [sic];
- (b) The 2006 balance sheet;
- (c) The general ledger for **1999 through 2005**, 2007 through 2008; and
- (d) A copy of the notebook referenced in document 104 and in any event, the following organized by category and chronological sequence:
 - the minutes of all shareholder meetings **since 1999**;
 - the minutes of all directors meetings, annual and special, **since 1999**;

the minutes of any subcommittee meetings, such as the dividend committee, the salary committee, the Gertrude McCann compensation committee; and

all corporate resolutions.

See Clark Aff., Exh. C (emphasis added).

Similarly, in a third set of discovery requests (an identical request was issued to the Corporation and William V. McCann, Jr.), Plaintiff requested:

REQUEST FOR PRODUCTION NO. 5: We have retained Hooper Cornell, P.L.L.C. and in particular Dennis Reinstein to evaluate matters. He requests the following information/records, needed to complete his investigation:

1. Electronic version of accounting records, i.e., Quickbooks files (native format) **1996 through present.**
2. Access to work papers of tax preparer, Dorothy Snowball.
3. Copies of minutes of Board and Committee meetings.
4. Employment and/or compensation agreements for all officers and directors.
5. Description of duties of officers and indication of amount of time each devotes to McCann Ranch.
6. The amount of compensation paid to directors and how it is determined.
7. Copies of W-2's for all employees.
8. Copies of 1099 forms issued.
9. Loan documents – Banner Bank line of credit.
10. Loan documents – Protective Life Insurance Company.
11. Lease agreement(s) related to property where McCann Ranch is paying rent.
12. Billing invoices related to legal services provided to the corporation by William McCann.

13. Data that would show the amount of time Bill McCann devotes to his law practice.

See Clark Aff., Exh. E (emphasis added).

The Defendants have responded to the discovery requests, objecting to the requests to the extent they seek pre-2001 documents, but producing responsive documents after January 5, 2001. However, Plaintiff continues to demand that pre-2001 documents be produced as well.

Plaintiff also requests access to the “work papers” of the corporation’s accountant. *Id.* at Request for Production No. 5, subpart 2. Those work papers are protected by the accountant-client privilege.

Counsel for the parties have met and conferred regarding this discovery dispute without resolution, thus necessitating a decision from the Court. The depositions of William V. McCann, Jr., Lori McCann and Gary E. Meisner have been set in the near future, and it is anticipated that Plaintiff’s counsel may inquire as to pre-2001 events. A decision from the Court as to the scope of discovery will provide the parties with the guidance necessary to conduct an orderly deposition without disputes over the scope of discovery.

III. ARGUMENT

The Court is authorized by I.R.C.P. 26(c) to grant a protective order with regard to the scope of discovery permissible in this action. I.R.C.P. 26(c) provides that:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions; (3) that discovery may be had only by a method of discovery other than that selected by the party seeking discovery; [or] that (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters

The Idaho Supreme Court has held that a trial court's "decision to grant a protective order is discretionary and will not be overturned absent an abuse of that discretion." *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 996 P.2d 798 (2000).

A. Discovery of Pre-2001 Documents and Events Should Not Be Permitted

The scope of discovery permissible in this case should be viewed in light of the fact that this is the second in a series of lawsuits brought by Plaintiff. This new litigation alleges similar facts and asserts the same legal theories already pursued in *McCann I* – alleged breaches of fiduciary duties (which cause of action has been dismissed) and an action for dissolution of the corporation. *McCann I* involved allegations against the Corporation up until January 1, 2001, the date on which the District Court dismissed the *McCann I* complaint in its entirety and rejected Plaintiff's motion to amend the complaint to add additional causes of action. Plaintiff was obligated to bring all of his transactionally related causes of action against the Defendants in *McCann I*. To allow Plaintiff to present evidence of conduct prior to January 1, 2001 would be to allow Plaintiff to either re-litigate *McCann I* or litigate claims that should have been litigated in *McCann I*. This Court recognized this fact in its March 4, 2009 Order. ("In addressing the new claims on the merits, the court anticipates that it will be considering events that took place after January 5, 2001.").

Moreover, discovery into pre-2001 events would create an undue burden and expense on the parties in that any claims based on those pre-2001 events would be barred by the statute of limitations. Plaintiff's dissolution cause of action would fall under the statute of limitations set forth in either Idaho Code § 5-218 (three year statute of limitations for "an action upon a liability created by statute, other than a penalty or forfeiture") or the 4 year catch-all statute of limitations

set forth in Idaho Code § 5-224. Either way, any claims based on pre-2001 events would be time-barred.

Given that the Court will only be “considering events that took place after January 5, 2001,” discovery should be limited to pre-2001 events and transactions. To allow Plaintiff to conduct discovery into pre-2001 events would only create an undue burden and expense on the parties.

In his motion to compel, Plaintiff lists a series of nine transactions. Plaintiff’s motion does not make clear exactly what he is asking for, but he appears to be requesting permission to conduct discovery into all pre-2001 events and transactions even though the pre-2001 events have already been litigated. For example, Plaintiff asserts that he should be permitted to conduct discovery into “consultation fees” paid to Gertrude McCann prior to 2000. The pre-2001 compensation paid to Gertrude McCann, however, was litigated in *McCann I*. In fact, it was discussed in the District Court’s Opinion dismissing *McCann I*. See pp. 2; 5 (Exhibit 4 to Memorandum in Support of Motion to Dismiss) (explaining that, in December 1998, “[t]he Board votes to pay Gertrude an annual consultation fee of \$48,000”; and that the Board voted to stop paying consultation fees in September 2000). Plaintiff has already litigated the issue of consultation fees paid pre-2001, and Plaintiff should not be permitted to re-litigate those issues now. Plaintiff is certainly free to inquire as to any post-2001 compensation paid to Gertrude McCann.

Plaintiff similarly wishes to inquire into the Corporation’s decision to pay Gertrude McCann for rent between 1988 and 2000. Again, this issue was litigated in *McCann I* and specifically addressed by the District Court in its Opinion dismissing *McCann I*. See *McCann I*

District Court Opinion, p. 5 (explaining that, in September 2000, "Plaintiff objects to paying Gertrude back rent for the shop for over twelve years").

Plaintiff requests discovery with regard to the Corporation's purchase of real property from Gertrude McCann in December of 2000. Given that this transaction occurred in the month prior to the dismissal of *McCann I*, the Defendants do not object to discovery with regard to this transaction. In fact, the documents requested with regard to this transaction have already been produced.

Plaintiff's cause of action for dissolution of the corporation turns on whether Plaintiff is being oppressed and whether irreparable injury is being suffered by the corporation. Pre-2001 events are not relevant to the inquiry. Moreover, pre-2001 events are barred by res judicata and/or collateral estoppel because they could and should have been litigated in *McCann I*. In fact, most of the issues being raised now actually were litigated in *McCann I*.

B. The Accountants' Work-Papers Are Privileged

Plaintiff next asks the Court to compel production of documents with regard to the request made by Plaintiff's expert to "Review the work papers utilized and/or used by [the Corporation's accountant, Dorothy Snowball] to prepare the tax returns and provide any other services to McCann Ranch & Livestock, Inc." See Plaintiff's Motion to Compel, p. 10.

Plaintiff asserts, without citation to any authority, that "there is no CPA/client privilege such as between and [sic] attorney and a client." See Plaintiff's Motion to Compel Discovery, p. 10. To the contrary, the Idaho Rules of Evidence expressly recognize an accountant-client privilege. That privilege protects the accountants' work papers. Idaho Rule of Evidence 515 provides:

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing

confidential communications made for the purpose of facilitating the rendition of professional accounting services to the client which were made (1) between the client or the client's representative and the accountant or the accountant's representative, (2) between the accountant and the accountant's representative, or (3) by the client or the client's representative or the client's accountant or a representative of the accountant to an accountant or a representative of an accountant representing another concerning a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among accountants and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client or for the client through the client's lawyer, accountant, guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the accountant or the accountant's representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the accountant or the accountant's representative to do so is presumed in the absence of evidence to the contrary.

In addition to Idaho Rule of Evidence 515(a)(5), Idaho Code § 9-203A specifically provides that communications between client and accountant are privileged:

1. Any licensed public accountant, or certified public accountant, cannot, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

....

4. The word "client" shall be deemed to include a person, a corporation or an association. The word "communication" as used herein shall be deemed to include but shall not be limited to, reports, financial statements, tax returns, or other documents relating to the client's personal and/or business financial status, whether or not said reports or documents were prepared by the client, the licensed public accountant or certified public accountant, or other person who prepared said documents at the direction of and under the supervision of said accountants.

(Emphasis added).

While no published Idaho opinion addresses whether an accountants' work papers fall within the privilege, the Report of the Idaho State Bar Evidence Committee, C 515, pp. 1-2 (4th Supp. 1985),¹ specifically explains that an accountant's working papers are protected by the Idaho Rule of Evidence 515 accountant-client privilege:

The working papers of the accountant have been recognized by the federal courts as belonging to the accountant and not the property of the client. *See, e.g., Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). It seems reasonable to conclude that documents such as these, which are the product of confidential communications, would be protected by the privilege, based on the same policy considerations that protect the "work product" of the attorney. *See* I.R.C.P. 26(b)(3) and I.C.R. 16(f)(1).

The "working papers" that Plaintiff requests are privileged because, as explained by the Evidence Committee, they are "the product of confidential communications" between the Corporation and its accountant.

Notably, the Corporation has provided Plaintiff access to its financial/accounting records going back to 2001, including the Corporation's tax returns, financial statements, trial balances and general ledgers

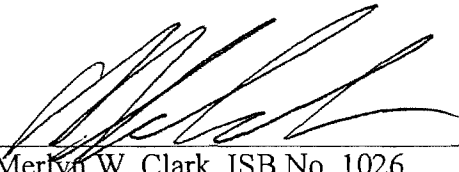
IV. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court issue an protective order limiting the scope of discovery to events and transaction occurring after to January 5, 2001. The Court should also deny Plaintiff's Motion to Compel.

¹ For the Court's convenience, a copy of the Report of the Idaho State Bar Evidence Committee is attached to the Affidavit of Merlyn W. Clark as Exhibit G.

DATED THIS 13th day of August, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Marilyn W. Clark, ISB No. 1026
Attorneys for Defendant William V.
McCann, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2009, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER by the method indicated below, and addressed to each of the following:

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☒ E-mail
☐ Telecopy: 208.746.0753

Charles F. McDevitt
McDEVITT MILLER
420 West Bannock
P.O. Box 2564
Boise, ID 83701
[Attorneys for Nominal Defendant]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy: 208.336.6912


Marilyn W. Clark

FILED

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PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
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Email: mclark@hawleytroxell.com
jashby@hawleytroxell.com

Attorneys for Defendant William V. McCann, Jr.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and
GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK
COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

AFFIDAVIT OF MERLYN CLARK IN
OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL AND IN
SUPPORT OF DEFENDANTS' MOTION
FOR PROTECTIVE ORDER

MERLYN W. CLARK, being first duly sworn, upon oath, deposes and says:

1. I am an attorney of record for Defendant William V. McCann, Jr., in the above
entitled matter and make this affidavit based upon my personal knowledge.

AFFIDAVIT OF MERLYN CLARK IN OPPOSITION TO PLAINTIFF'S MOTION TO
COMPEL AND IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER - 1

629

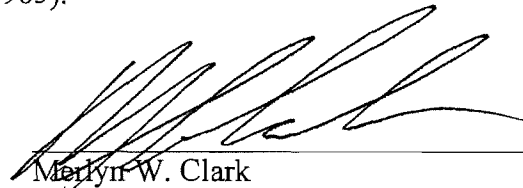
2. Attached hereto as Exhibits A and B are true and accurate copies of Plaintiff's First Interrogatories and Requests For Production Of Documents To Defendant William V. McCann, Jr., and Defendant William V. McCann's responses to said discovery requests.

3. Attached hereto as Exhibits C and D are true and accurate copies of Plaintiff's Second Interrogatories and Requests For Production Of Documents To the Corporation and the Corporation's responses to said discovery requests.

4. Attached hereto as Exhibits E and F are true and accurate copies of Plaintiff's Third Interrogatories and Requests For Production Of Documents To William V. McCann, Jr., and William V. McCann Jr.'s responses to said discovery requests.

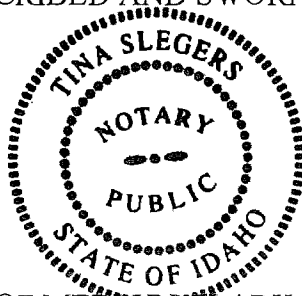
5. In response to Plaintiff's discovery requests, the Defendants have provided Plaintiff access to the Corporation's financial/accounting records going back to 2001, including the Corporation's tax returns, financial statements, trial balances and general ledgers.

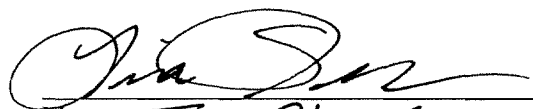
6. Attached hereto as Exhibit G is a copy of relevant pages of the Report of the Idaho State Bar Evidence Committee (4th Supp. 1985).


Marilyn W. Clark

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 13th day of August, 2009.




Name: Tina Slegers
Notary Public for Idaho
Residing at Nampa, ID
My commission expires June 11, 2015

AFFIDAVIT OF MERLYN CLARK IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER - 2

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF MERLYN CLARK IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER by the method indicated below, and addressed to each of the following:

Timothy Esser
ESSER & SANDBERG, PLLC
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☒ Telecopy: 509.334.2205

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk, #6
Moscow, ID 83843
[Attorneys for Plaintiff]

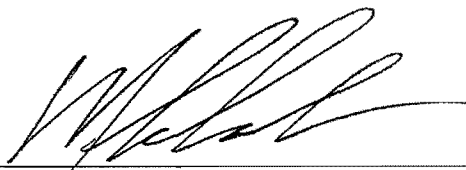
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

Michael E. McNichols
CLEMENTS BROWN
321 13th Street
P.O. Box 1510
Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

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☐ Hand Delivered
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☐ Telecopy: 208.746.0753

Charles F. McDevitt
McDEVITT MILLER
420 West Bannock
P.O. Box 2564
Boise, ID 83701
[Attorneys for Nominal Defendant]

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☐ Telecopy: 208.336.6912



Merlyn W. Clark

Timothy Esser #6770
Libey, Ensley, Esser & Nelson
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Phone: (509) 332-7692
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Andrew Schwam #1574
Schwam Law Firm
514 South Polk #6
Moscow, ID 83843
Phone: (208) 882-4190

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)	
	)	No. CV08-01226
Plaintiff,)	
v.	)	PLAINTIFF'S FIRST
	)	INTERROGATORIES AND
WILLIAM V. McCANN, JR., and	)	REQUESTS FOR PRODUCTION OF
GARY E. MEISNER,	)	DOCUMENTS TO DEFENDANT
Defendants,	)	WILLIAM V. McCANN, JR.
)	
McCANN RANCH & LIVESTOCK)	
COMPANY, INC.,)	
)	
Nominal Defendant.)	

TO: Defendant William McCann, Jr.
AND TO: Merlyn Clark, attorney for Defendant for William McCann, Jr.

Plaintiff Ronald McCann, pursuant to Rules 33, 34 and 36 I.R.C.P. requests Defendant William McCann, Jr. to answer the following interrogatories and produce documents as requested below:

INTERROGATORY NO. 1: What financial benefits, if any, have you received from the Defendant corporation since your father's death, including benefits to your law practice, wife, and step-children.

ANSWER:

REQUEST FOR PRODUCTION NO. 1: Produce all correspondence generated since January 1, 1997 between you and: 1) Gertrude McCann; 2) McCann Ranch & Livestock Co.; 3) Gary Meisner; and 4) James Schoff. And by correspondence we mean emails, facsimile transmissions, letters, communications of any nature.

RESPONSE:

INTERROGATORY NO. 2: Detail all financial transactions between the corporation and Gertrude McCann since January 1, 1997 through the present.

ANSWER:

REQUEST FOR PRODUCTION NO. 2: Produce all documents that refer to, evidence, explain or are otherwise relevant to each financial transaction between the corporation and Gertrude McCann since 1997, including:

- a) Schedules and any other documents from tax returns.
- b) Correspondence between the corporation and Gertrude McCann, including correspondence between the directors and Gertrude McCann.
- c) Ledgers, account statements, leases, purchase and sale documents, payments made on behalf of Gertrude McCann.
- d) Minutes of any meeting at which transactions with Mrs. McCann were discussed.

RESPONSE:

INTERROGATORY NO. 3: Where are the prior Wills and Codicils of William McCann, Sr., including those itemized in his Last Will dated May 6, 1996, presently located?

ANSWER:

REQUEST FOR PRODUCTION NO. 3: Produce copies of all William McCann, Sr.'s Wills and Codicils executed before his Last Will.

RESPONSE:


INTERROGATORY NO. 3: Itemize all attorney fees and costs paid on your behalf concerning this case and state the source and if not paid from your own funds the authority you rely on.

ANSWER:

DATED: This 10th day of October 2008.

Libey, Ensley, Esser & Nelson

By


Timothy Esser #6770

CERTIFICATE OF SERVICE

I certify that on the 10th day of October 2008, a true and correct copy of the foregoing document was served by mail, postage prepaid, to the following addresses:

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley
P.O. Box 1617
Boise, ID 83701-1617

Charles F. McDevitt and Dean Miller
McDevitt & Miller, LLP
P.O. Box 2564
Boise, ID 83702

Michael E. McNichols
Clements, Brown & McNichols, P.A.
P.O. Box 1501
Lewiston, ID 83501



Timothy Esser

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
Will Wardwell, ISB No. 7043
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 342-3829
Email: mwc@hteh.com
jash@hteh.com
wwar@hteh.com

Attorneys for Defendant William V. McCann, Jr.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)	
)	
Plaintiff,	)	Case No. CV 08-01226
)	
vs.)	
	)	MCCANN'S RESPONSE TO
	)	PLAINTIFF'S FIRST
WILLIAM V. McCANN, JR., and GARY E.	)	INTERROGATORIES AND REQUESTS
MEISNER,	)	FOR PRODUCTION OF DOCUMENTS
)	
Defendants.)	
)	
)	
McCANN RANCH & LIVESTOCK)	
COMPANY, INC.,)	
)	
Nominal Defendant.)	
)	

TO: PLAINTIFF AND HIS COUNSEL OF RECORD

COMES NOW William Vern McCann, Jr., a Defendant in the above-entitled action, by
and through his counsel of record, Hawley Troxell Ennis & Hawley LLP, and, in accordance

MCCANN'S RESPONSE TO PLAINTIFF'S FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
AND IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER

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EXHIBIT E

with the requirements of Rules 33 and 34 of the Idaho Rules of Civil Procedure, hereby files his response to "Plaintiff's First Interrogatories and Requests for Production of Documents to Defendant William V. McCann, Jr."

Unless otherwise specified, inspection and copying will be permitted as requested, except that some other time and place which is mutually agreeable to the parties may be substituted for the time and place specified in the request.

INTERROGATORY NO. 1: What financial benefits, if any, have you received from the Defendant corporation since your father's death, including benefits to your law practice, wife, and step-children.

ANSWER TO INTERROGATORY NO. 1: Defendant objects to this Interrogatory on the grounds that it is vague and ambiguous as to the term "financial benefits" and on grounds that it seeks information not relevant or reasonably calculated to lead to the discovery of admissible evidence.

Without waiving these objections, Defendant states that he receives a salary from the corporation and is allowed the use of a company vehicle, including fuel. His law office receives a monthly amount to help defray costs for maintaining the corporate office, including the use of the office assistant/secretary to handle the day-to-day phone calls, mail, paying of bills, telephone, copies, faxes, and other expenses associated with running an office. Since January 5, 2001, Defendant has only billed and received the total amount of \$12,750 for drafting and reviewing commercial leases. His wife receives a salary for the work she does to maintain the corporate books, preparation of corporation payroll tax reports, maintaining the lease files, preparing corporate correspondence and records as required, and preparing other financial reports as needed by the corporation. In addition to her salary, she has received an annual bonus in an amount between \$1,000 and \$1,500 for the last several years. One step-son is employed full-time by the corporation. He receives an hourly wage for

the work he does. In addition, he receives an employee benefit of dental insurance through Delta Dental of Idaho, and for the last few years has received an annual bonus in an amount between \$1,000 and \$1,500. His other step-son worked part-time while attending the University of Idaho and was paid an hourly wage for the hours he worked.

REQUEST FOR PRODUCTION NO. 1: Produce all correspondence generated since January 1, 1997 between you and: 1) Gertrude McCann; 2) McCann Ranch & Livestock Co.; 3) Gary Meisner; and 4) James Schoff, and by correspondence, we mean emails, facsimile transmissions, letters, communications of any nature.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: Defendant will produce the requested correspondence since January 5, 2001.

INTERROGATORY NO 2: Detail all financial transactions between the corporation and Gertrude McCann since January 1, 1997 through the present.

ANSWER TO INTERROGATORY NO. 2: Since January 5, 2001, the financial transactions between the corporation and Gertrude McCann are as follows:

A monthly amount for upkeep and maintenance on the 310 Stewart Ave., property. The Plaintiff has been provided this information through the financial records.

Utilities for the 310 Stewart Ave., property are paid by the corporation as agreed in the Purchase and Sales Agreement. The amounts have been provided to Plaintiff through the financial records.

Use of a corporate vehicle. Plaintiff was provided this information previously in correspondence to Plaintiff and his lawyers. This has been an ongoing arrangement since the late 70s or early 80s.

Hay is purchased and delivered to the 310 Stewart Ave., property for feeding of Gertrude's cattle located on the premises. This has been an ongoing practice since the early 70s.

By corporate resolution, it was agreed to trade promissory notes with Gertrude McCann to offset amounts owed by the corporation to Gertrude McCann for shop rent and amounts owed to the corporation by Gertrude McCann.

REQUEST FOR PRODUCTION NO. 2: Produce all documents that refer to, evidence, explain or are otherwise relevant to each financial transaction between the corporation and Gertrude McCann since 1997, including:

- a) Schedules and any other documents from tax returns.
- b) Correspondence between the corporation and Gertrude McCann, including correspondence between the directors and Gertrude McCann.
- c) Ledgers, account statements, leases, purchase and sale documents, payments made on behalf of Gertrude McCann.
- d) Minutes of any meeting at which transactions with Mrs. McCann were discussed.

ANSWER TO REQUEST FOR PRODUCTION NO. 2: With regard to subsection (a), the Plaintiff has been provided all tax returns and schedules up to and including December 2007. The 2008 tax returns have recently been completed and are now available for copying. With regard to subsection (b) Defendant will produce the requested information since January 5, 2001. With regard to subsection (c), the corporation's financial reports, including general ledger, profit and loss, balance sheet, and trial balance through December 2007, have all been provided previously to Plaintiff. The Defendant will make the 2008 general ledger, balance sheet, profit and loss statement, and trial balance available to the Plaintiff. In addition, all commercial leases have been previously provided to Plaintiff and his attorneys. Other information as to the purchase and sale documents of 310 Stewart Ave., are available for Plaintiff. As to payments made on behalf of Gertrude McCann, the Plaintiff has copies of the General Ledgers showing said payments to Gertrude McCann through December 2007.

Any and all payments made to Gertrude McCann in 2008 are available in the 2008 financial reports as stated above and are available to the Plaintiff. As to subsection (d) the Defendant will make available any such minutes from January 5, 2001 through the present.

INTERROGATORY NO. 3: Where are the prior Wills and Codicils of William McCann, Sr., including those itemized in his Last Will dated May 6, 1996, presently located?

ANSWER TO INTERROGATORY NO. 3: Defendant McCann does not know nor does he have copies of any prior Wills and Codicils.

REQUEST FOR PRODUCTION NO. 3: Produce copies of all William McCann, Sr.'s Wills and Codicils executed before his Last Will.


ANSWER TO REQUEST FOR PRODUCTION NO. 3: Defendant does not have copies to produce.

INTERROGATORY NO. 3 [sic]: Itemize all attorney fees and costs paid on your behalf concerning this case and state the source and if not paid from your own funds the authority you rely on.

ANSWER TO INTERROGATORY NO. 3 [sic]: Defendant objects to this Interrogatory on grounds that it seeks information protected by the attorney client privilege and that it requests information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Defendant states that his attorneys' fees are being advanced by the corporation pursuant to Idaho Code §30-1-853.

DATED THIS 25th day of March, 2009.


HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Mervyn W. Clark, ISB No. 1026
Attorneys for Defendant William V. McCann,
Jr.

VERIFICATION

William V. McCann, Jr., being first duly sworn upon oath, deposes and says:

That he is a Defendant in the above-entitled action, that he has read the within and foregoing MCCANN'S RESPONSE TO PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS, and that the statements therein contained are true.

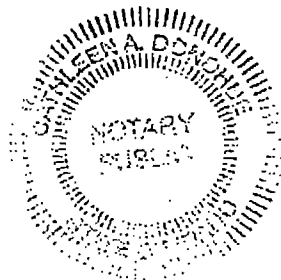


William V. McCann, Jr.

STATE OF IDAHO)
) ss.
County of Ada)

I, Cathleen A. Donohue, a Notary Public, do hereby certify that on this 24th day of March, 2009, personally appeared before me William V. McCann, Jr., who, being by me first duly sworn, declared that he is a Defendant in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Cathleen A. Donohue

Notary Public for Idaho
Residing at Lewiston
My commission expires 3-29-13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of March, 2009, I caused to be served a true copy of the foregoing MCCANN'S RESPONSE TO PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS by the method indicated below, and addressed to each of the following:

Timothy Esser
LIBEY ENSLEY ESSER & NELSON
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk, #6
Moscow, ID 83843
[Attorneys for Plaintiff]

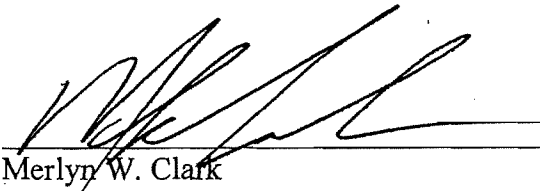
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

Michael E. McNichols
CLEMENTS BROWN
321 13th Street
P.O. Box 1510
Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

Charles F. McDevitt
McDEVITT MILLER
420 West Bannock
P.O. Box 2564
Boise, ID 83701
[Attorneys for Nominal Defendant]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy


Merlyn W. Clark

McCann
Discovery
40100-1

Timothy Esser #6770
Libey, Ensley, Esser & Nelson
520 East Main Street
Pullman, Washington 99163
Phone: (509) 332-7692
Fax: (509) 334-2205

Andrew Schwam #1573
Schwam Law Firm
514 South Polk #6
Moscow, ID 83843
Phone: (208) 882-4190

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)	
	)	No. CV08-01226
Plaintiff,)	
v.	)	PLAINTIFF'S SECOND
	)	INTERROGATORIES AND
WILLIAM V. McCANN, JR., and	)	REQUESTS FOR PRODUCTION OF
GARY E. MEISNER,	)	DOCUMENTS TO McCANN RANCH
Defendants,	)	& LIVESTOCK COMPANY, INC.
)	
McCANN RANCH & LIVESTOCK)	
COMPANY, INC.,)	
)	
Nominal Defendant.)	

TO: Defendant McCann Ranch & Livestock Company, Inc.
AND TO: Charles F. McDevitt and Dean Miller, attorneys for Defendant McCann Ranch & Livestock Company, Inc

Plaintiff Ronald McCann, pursuant to Rules 33, 34 and 36 I.R.C.P. requests Defendant McCann Ranch & Livestock Company, Inc. to answer the following interrogatories and produce documents as requested below:

REQUEST FOR PRODUCTION NO. 6: Financial Records: We request the following financial records:

- (a) Trial balances for the 1996 through 2007;
- (b) The 2006 balance sheet;
- (c) The general ledger for 1999 through 2005, 2007 through 2008; and
- (d) A copy of the notebook referenced in document 104 and in any event, the following organized by category and chronological sequence:
 - the minutes of all shareholder meetings since 1999;
 - the minutes of all directors meetings, annual and special, since 1999;
 - the minutes of any subcommittee meetings, such as the dividend committee, the salary committee, the Gertrude McCann compensation committee; and
 - all corporate resolutions.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: Loan Documents: We request all applications and financial statements prepared as part of the corporation's effort to refinance the properties, which eventually was accomplished through Protective Life Corporation. This includes any applications and/or financial statements submitted to Protective Life Corporation and any other prospective lender.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Legal Fees: Itemize all legal fees paid to the William McCann law firm since 1999 by the corporation, including any fees paid for services rendered by any assistants/associates at said office.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Provide any documents which support the alleged amount Gertrude owed to the corporation (\$165,341.49).

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Provide a signed copy of the Sales Agreement by which the corporation purchased Gertrude's real estate.

RESPONSE:

INTERROGATORY NO. 7: Explain how the amount purportedly owed by Gertrude to the corporation, \$165,341.49, was calculated. Provide the dates the alleged obligations were incurred and detail what the obligations were for.

ANSWER:

DATED: This 7th day of May 2009.

Libey, Ensley, Esser & Nelson

By 

Timothy Esser #6770

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2009, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley
P.O. Box 1617
Boise, ID 83701-1617

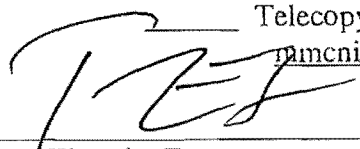
XX U.S. Mail, Postage Prepaid
____ Email
____ Telecopy – mwc@htch.com

Charles F. McDevitt and Dean Miller
McDevitt & Miller, LLP
P.O. Box 2564
Boise, ID 83702

XX U.S. Mail, Postage Prepaid
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____ Telecopy –
chas@mcdevitt-miller.com

Michael McNichols
Clements, Brown McNichols, P.A.
P.O. Box 1510
Lewiston, ID 83501

XX U.S. Mail, Postage Prepaid
____ Email
____ Telecopy –
mmcnichols@clbrmc.com


Timothy Esser

Chas. F. McDevitt (ISB No. 835)
Dean J. Miller (ISB No. 1968)
MCDEVITT & MILLER LLP
420 West Bannock Street
P.O. Box 2564-83701
Boise, Idaho 83702
Tel.: 208-343-7500
Fax: 208-336-6912

chas@mcdevitt-miller.com

Attorneys for Nominal Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and
GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK
COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

NOMINAL DEFENDANT MCCANN
RANCH & LIVESTOCK COMPANY,
INC.'S RESPONSE TO PLAINTIFF'S
SECOND INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS

TO: PLAINTIFF AND HIS COUNSEL OF RECORD

COMES NOW McCann Ranch & Livestock, Inc., the Nominal Defendant in the
above-entitled action, by and through its counsel of record, McDevitt & Miller LLP, and, in
accordance with the requirements of Rules 33 and 34 of the Idaho Rules of Civil Procedure,

NOMINAL DEFENDANT MCCANN RANCH & LIVESTOCK COMPANY, INC.'S
RESPONSE TO PLAINTIFF'S SECOND INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS
AFFIDAVIT OF MERLYN CLARK IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
MOTION FOR PROTECTIVE ORDER

hereby files its response to Plaintiff's Second Interrogatories and Requests for Production of Documents to McCann Ranch & Livestock Company, Inc.

Unless otherwise specified, inspection and copying will be permitted as requested, except that some other time and place which is mutually agreeable to the parties may be substituted for the time and place specified in the request.

REQUEST FOR PRODUCTION NO. 6: Financial Records: We request the following financial records:

- (a) Trial balances for the 1996 through 2007 [sic];
- (b) The 2006 balance sheet;
- (c) The general ledger for 1999 through 2005, 2007 through 2008; and
- (d) A copy of the notebook referenced in document 104 and in any event, the following organized by category and chronological sequence:

- the minutes of all shareholder meetings since 1999;
- the minutes of all directors meetings, annual and special, since 1999;
- the minutes of any subcommittee meetings, such as the dividend committee, the salary committee, the Gertrude McCann compensation committee; and
- all corporate resolutions.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: Defendant objects to this interrogatory to the extent that it seeks the production of documents prior to January 5, 2001. Defendant further objects on grounds that this request is overbroad and seeks documents that are neither relevant nor reasonably calculated to lead to admissible evidence. Moreover, Defendant

has already produced many of the requested documents. Notwithstanding and without waiving

NOMINAL DEFENDANT MCCANN RANCH & LIVESTOCK COMPANY, INC.'S
RESPONSE TO PLAINTIFF'S SECOND INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS
AFFIDAVIT OF MERLYN CLARK IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
MOTION FOR PROTECTIVE ORDER

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these objections, Defendant will produce the documents requested (after January 5, 2001) that Defendant has in its possession, custody or control.

REQUEST FOR PRODUCTION NO. 7: Loan Documents: We request all applications and financial statements prepared as part of the corporation's effort to refinance the properties, which eventually was accomplished through Protective Life Corporation. This includes any applications and/or financial statements submitted to Protective Life Corporation and any other prospective lender.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: Defendant will produce the responsive documents that Defendant has in its possession, custody or control.

REQUEST FOR PRODUCTION NO. 8: Legal Fees: Itemize all legal fees paid to the William McCann law firm since 1999 by the corporation, including any fees paid for services rendered by any assistants/associates at said office.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8: Defendant objects to this interrogatory to the extent that it seeks the production of documents or information prior to January 5, 2001. Without waiving these objections, the Corporation paid legal fees to the William V. McCann, Jr. law firm in the following amounts:

2001: \$8,000 for lease negotiations, drafting of lease, etc. regarding Big 5.

2005: \$4,000 for lease negotiations, drafting of lease, etc. regarding Dollar Tree.

2006: \$4,750 for lease negotiations, drafting of lease, etc, regarding Sally's Beauty.

During 2001 through 2003, the Corporation paid the William V. McCann, Jr. law firm \$600 per month for reimbursement of office expenses, including lights, rent, phone, copies, faxes, office supplies, etc. From 2004 through the present, the Corporation has paid the William

V. McCann, Jr. law firm \$1,200 per month for reimbursement of office expenses, including lights, rent, phone, copies, faxes, office supplies, etc.

REQUEST FOR PRODUCTION NO. 9: Provide any documents which support the alleged amount Gertrude owed to the corporation (\$165,341.49).

RESPONSE TO REQUEST FOR PRODUCTION NO. 9: See documents already produced Bates numbered WVM00001-00008.

REQUEST FOR PRODUCTION NO. 10: Provide a signed copy of the Sales Agreement by which the corporation purchased Gertrude's real estate.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: Defendant will produce the responsive documents that Defendant has in its possession, custody or control

INTERROGATORY NO. 7: Explain how the amount purportedly owed by Gertrude to the corporation, \$165,341.49, was calculated. Provide the dates the alleged obligations were incurred and detail what the obligations were for.

ANSWER TO INTERROGATORY NO. 7: Beginning long before the death of William, V. McCann, Sr., the Corporation advanced payments incurred by William V. McCann and also for Gertrude McCann. For example, the Corporation advanced expenses for fuel, telephone, utilities, insurance, and property taxes, etc. As of January 2001, the financial records of Defendant disclosed the sum of \$92,750.74 carried in a line item attributed to William V. McCann, Sr. The records of Defendant showed it had advanced payments for the benefit of Gertrude McCann in the amount of \$23,236.96, including accumulated interest. Sums were added as reflected on 12/31/05 balance sheet and Gertrude McCann signed a note for these amounts (i.e. \$165,341.49).

Dated this 4th day of June, 2009.

MCDEVITT & MILLER LLP

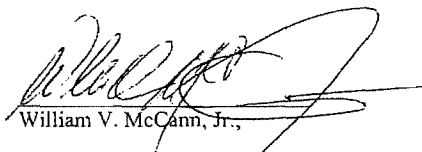
By: 

Chas F. McDevitt

VERIFICATION

William V. McCann, Jr., being first duly sworn on oath, deposes and says:

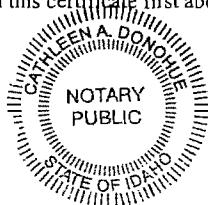
That he is the President of McCann Ranch and Livestock Company, Inc., Nominal Defendant in the above entitled action, that he has read the within and foregoing Nominal Defendant William McCann Ranch and Livestock Company, Inc.'s Response to Plaintiff's Second Interrogatories and Requests for Production of Documents, and that the statements contained herein are true.

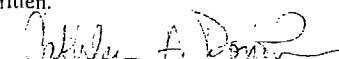

William V. McCann, Jr.,

STATE OF IDAHO)
Nez Perce) ss.
County of Ada)

I, Cathleen A. Donohue, a Notary Public, do hereby certify that on this 14 day of June, 2009, personally appeared before me William V. McCann, Jr., who, being by me first duly sworn, declared that he is a President of McCann Ranch and Livestock Company, Inc., Nominal Defendant in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.




Notary Public for Idaho
Residing at: Burton
Commission Exp.: 3-29-13

NOMINAL DEFENDANT MCCANN RANCH & LIVESTOCK COMPANY, INC.'S
RESPONSE TO PLAINTIFF'S SECOND INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS - 6

40100.0006.1540568.1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2009, I caused to be served a true copy of the foregoing NOMINAL DEFENDANT MCCANN RANCH & LIVESTOCK COMPANY, INC.'S RESPONSE TO PLAINTIFF'S SECOND INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS by the method indicated below, and addressed to each of the following:

Timothy Esser
LIBEY ENSLEY ESSER & NELSON
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk, #6
Moscow, ID 83843
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy

Michael E. McNichols
CLEMENTS BROWN
321 13th Street
P.O. Box 1510
Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

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☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy

Merlyn Clark
HAWLEY TROXELL ENNIS
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

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☐ Hand Delivered
☒ Overnight Mail
☐ E-mail
☐ Telecopy

Heather Houli, Legal Asst.
McDevitt & Miller LLP

Timothy Esser #6770
Libey, Ensley, Esser & Nelson
520 East Main Street
Pullman, Washington 99163
Phone: (509) 332-7692
Fax: (509) 334-2205

Andrew Schwam #1573
Schwam Law Firm
514 South Polk #6
Moscow, ID 83843
Phone: (208) 882-4190

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)	
	)	No. CV08-01226
Plaintiff,)	
v.	)	PLAINTIFF'S THIRD REQUEST FOR
	)	PRODUCTION OF DOCUMENTS TO
WILLIAM V. McCANN, JR., and	)	DEFENDANT WILLIAM V. McCANN,
GARY E. MEISNER,	)	JR.
Defendants,)	
)	
McCANN RANCH & LIVESTOCK)	
COMPANY, INC.,)	
)	
Nominal Defendant.)	

TO: Defendant William McCann, Jr.
AND TO: Merlyn Clark, attorney for Defendant for William McCann, Jr.

Plaintiff Ronald McCann, pursuant to Rules 33, 34 and 36 I.R.C.P. requests Defendant William McCann, Jr. to answer the following interrogatories and produce documents as requested below:

===== EXHIBIT F

REQUEST FOR PRODUCTION NO. 5: We have retained Hooper Cornell, P.L.L.C. and in particular Dennis Reinstein to evaluate matters. He requests the following information/records, needed to complete his investigation:

1. Electronic version of accounting records, i.e., Quickbooks files (native format). 1996 through present.
2. Access to work papers of tax preparer, Dorothy Snowball.
3. Copies of minutes of Board and Committee meetings.
4. Employment and/or compensation agreements for all officers and directors.
5. Description of duties of officers and indication of amount of time each devotes to McCann Ranch.
6. The amount of compensation paid to directors and how it is determined.
7. Copies of W-2's for all employees.
8. Copies of 1099 forms issued.
9. Loan documents – Banner Bank line of credit.
10. Loan documents – Protective Life Insurance Company.
11. Lease agreement(s) related to property where McCann Ranch is paying rent.
12. Billing invoices related to legal services provided to the corporation by William McCann.
13. Data that would show the amount of time Bill McCann devotes to his law practice.

RESPONSE:

DATED: This 29th day of May 2009.

By


Timothy Esser #6770

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2009 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley
P.O. Box 1617
Boise, ID 83701-1617

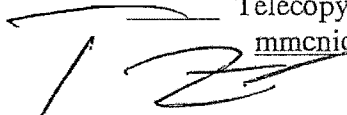
XX U.S. Mail, Postage Prepaid
____ Email
____ Telecopy – mwc@hteh.com

Charles F. McDevitt and Dean Miller
McDevitt & Miller, LLP
P.O. Box 2564
Boise, ID 83702

XX U.S. Mail, Postage Prepaid
____ Email
____ Telecopy –
chas@mcdevitt-miller.com

Michael McNichols
Clements, Brown McNichols, P.A.
P.O. Box 1510
Lewiston, ID 83501

XX U.S. Mail, Postage Prepaid
____ Email
____ Telecopy –
mmcnichols@clbrmc.com



Timothy Esser

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5210
Email: mclark@hawleytroxell.com
jashby@hawleytroxell.com

Attorneys for Defendant William V. McCann, Jr.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and
GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK
COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

DEFENDANT WILLIAM V. MCCANN,
JR.'S RESPONSE TO PLAINTIFF'S
THIRD REQUESTS FOR PRODUCTION
OF DOCUMENTS

TO: PLAINTIFF AND HIS COUNSEL OF RECORD

COMES NOW William V. McCann, Jr., a Defendant in the above-entitled action, by and through his counsel of record, Hawley Troxell Ennis & Hawley LLP, and, in accordance with the requirements of Rules 33 and 34 of the Idaho Rules of Civil Procedure, hereby files his response to Plaintiff's Third Requests for Production of Documents to Defendant William V. McCann, Jr.

DEFENDANT WILLIAM V. MCCANN, JR.'S RESPONSE TO PLAINTIFF'S THIRD
REQUESTS FOR PRODUCTION OF DOCUMENTS
AND IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER

EXHIBIT

Unless otherwise specified, inspection and copying will be permitted as requested, except that some other time and place which is mutually agreeable to the parties may be substituted for the time and place specified in the request.

REQUEST FOR PRODUCTION NO. 5: We have retained Hooper Cornell, P.L.L.C. and in particular Dennis Reinstein to evaluate matters. He requests the following information/records, needed to complete his investigation:

1. Electronic version of accounting records, i.e., Quickbooks files (native format) 1996 through present.
2. Access to work papers of tax preparer, Dorothy Snowball.
3. Copies of minutes of Board and Committee meetings.
4. Employment and/or compensation agreements for all officers and directors.
5. Description of duties of officers and indication of amount of time each devotes to McCann Ranch.
6. The amount of compensation paid to directors and how it is determined.
7. Copies of W-2's for all employees.
8. Copies of 1099 forms issued.
9. Loan documents – Banner Bank line of credit.
10. Loan documents – Protective Life Insurance Company.
11. Lease agreement(s) related to property where McCann Ranch is paying rent.
12. Billing invoices related to legal services provided to the corporation by William McCann.
13. Data that would show the amount of time Bill McCann devotes to his law practice.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: Defendant objects to this Request for Production of Documents on grounds that it is vague, ambiguous, overbroad, seeks documents neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks documents prior to January 5, 2001. Notwithstanding and without waiving these objections, Defendant responds as follows:

1. Defendant will produce its electronic accounting records (Quickbooks) going back to 2004, which is as far back as Defendant has electronic accounting records.
2. The only "work papers" in Defendants possession, custody and control are the trial balances, which Defendant will produce going back to 2001. Defendant understands that these are the only "work papers" that exists.
3. Defendant will produce its minutes of Board and Committee meetings going back to 2001.
4. Other than as contained Board and/or Committee minutes being produce, Defendant does not possess responsive documents.
5. A description of the President and CEO job duties will be produced. Defendant does not possess other responsive documents.
6. Defendant does not possess responsive documents.
7. Responsive documents going back to 2001 will be produced.
8. Responsive documents going back to 2001 will be produced.
9. Responsive documents going back to 2001 will be produced.
10. Responsive documents going back to 2001 will be produced.
11. The responsive documents have already been produced.
12. Responsive documents going back to 2001 will be produced.

13. See Answer to Interrogatory No. 4.

DATED THIS 26 day of June, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

D. John Ashby, ISB No. 7228

Attorneys for Defendant

William V. McCann, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2009, I caused to be served a true copy of the foregoing DEFENDANT WILLIAM V. MCCANN, JR.'S RESPONSE TO PLAINTIFF'S THIRD REQUESTS FOR PRODUCTION OF DOCUMENTS by the method indicated below, and addressed to each of the following:

Timothy Esser
LIBEY ENSLEY ESSER & NELSON
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk, #6
Moscow, ID 83843
[Attorneys for Plaintiff]

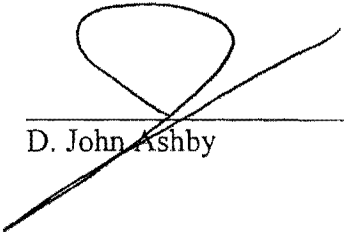
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Michael E. McNichols
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Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

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☐ Overnight Mail
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Charles F. McDevitt
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Boise, ID 83701
[Attorneys for Nominal Defendant]

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☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy



D. John Ashby

REPORT
OF THE
IDAHO STATE BAR EVIDENCE COMMITTEE

Merlyn W. Clark, Chairman

December 16, 1983

1. Supplemented August 20, 1984, with Revisions dated 5/18/84
2. Supplemented December 7, 1984, with Revisions dated 12/7/84
3. Supplemented December 31, 1984, with Revisions dated 12/31/84
4. Supplemented June 1, 1985, with Revisions dated 6/1/85

COMMENT TO RULE 515

Prior Idaho Statutes or Rules: Idaho Code § 9-203A.

Comparable Federal Rule: None. No similar rule was proposed.

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

The accountant-client privilege is not recognized by either the common law or the federal courts, and no state-created privilege was recognized in federal cases prior to enactment of F.R.E. 501. See, e.g., Couch v. United States, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). The limited recognition of state-created privileges afforded under F.R.E. 501 does not apply in federal tax cases or other federal regulatory matters because federal law, not state law, supplies the rule of decision in such cases. Communications to an accountant will be protected in federal court cases where F.R.E. 501 is inapplicable only if they can be brought within the scope of a privilege recognized in the federal system, e.g., the attorney-client privilege. See, e.g., United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

Comment: Rule 515 recognizes and provides for the accountant-client privilege now provided in Idaho Code § 9-203A:

Any licensed public accountant, or certified public accountant, can not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The word "client" used herein shall be deemed to include a person, a corporation or an association. The word "communication" as used herein shall be deemed to include but shall not be limited to, reports, financial statements, tax returns, or other documents relating to the client's personal and/or business financial status, whether or not said reports or documents were prepared by the client, the licensed public accountant or certified public accountant, or other person who prepared said documents at the direction

of and under the supervision of said accountants.

The wording of the accountant-client privilege in Idaho Code § 9-203A is identical to that of the attorney-client privilege in Section 9-203(2), with two exceptions: first, the reference to accountants rather than attorneys; second, the definition of "communication" provided in Section 9-203A is not found in Section 9-203(2).

Enacted in 1978, there are no Idaho decisions interpreting Section 9-203A. It seems reasonable to believe, however, that one may look to the Idaho decisions interpreting Section 9-203(2) for guidance in applying Section 9-203A, to the extent that the wording is identical.

For the reasons stated in the Comment to Rule 502, the Idaho Committee recommends the adoption of a rule for the accountant-client privilege rather than retention of the existing Idaho statute and case law.

In view of the fact that the Legislature evidenced its intent to confer a privilege upon accountants identical to the attorney-client privilege except for the definition of "communication," in recognition of the parallelism between this privilege and the attorney-client privilege, and in the interest of uniformity in the Rules of Evidence, the language of Rule 515 is made identical to Rule 502, with two exceptions: first, the reference to accountants and accounting services; second, the substitution of the language from the statute "any licensed public accountant or certified public accountant" in place of the word "person" in the definition of an accountant in subsection (a)(3).

Subsection (a) provides the definitions which govern the application of the rule.

Subsection (a)(1) encompasses the language of the statute in the definition of "client," but adds the public officer and public entity to make clear that the privilege is not limited to clients from the private sector. It also makes clear that one who consults an accountant with a view to obtaining his services is included within the definition, even though no contract of employment results.

Subsection (a)(2) defines "representative of the client," in language that rejects the "control group" test. The statute expressly provides that "client" includes "a corporation or an association," and by implication includes agents or

employees since a corporation or association can act only through its agents or employees. The statute, however, provides no guidelines to determine what agents or employees are within the scope of the privilege. The rule is intended to remove the ambiguity and provides the same guidelines as are applied to the attorney-client privilege.

Subsection (a)(3) restricts the definition of an accountant to include only a "licensed public accountant or certified public accountant" as is now provided in the statute.

The Idaho statute does not limit the privilege to an accountant licensed by Idaho. From the language "any licensed public accountant, or certified public accountant," it may be inferred that it is not intended to be limited to those licensed by Idaho. The rule removes any ambiguity in this regard by expressly including within the definition any licensed public accountant or certified public accountant "authorized to engage in the practice of accounting in any state or nation" as is done in the attorney-client privilege rule. Like Rule 502, the definition includes the accountant "reasonably believed by the client to be authorized" to engage in the practice of accounting.

Subsection (a)(4) recognizes that accountants, like lawyers, must utilize assistants in rendering services to the client.

Subsection (a)(5) defines the "confidential communication" in terms of intent that it not be disclosed as do the other rules of privilege. This may be a modification of the statutory privilege to the extent that the communication remains privileged even though overheard by the eavesdropper. The rule may further modify the statutory provision making the privilege applicable to "any communication" to the extent the rule requires intent that it not be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of the service or those reasonably necessary to the transmission of the communication.

The definition of a "confidential communication" in subsection (a)(5), omits the language of the statute incorporating reports, financial statements, tax returns, etc. within the definition. The Idaho Committee can find no justification for the provision that could be interpreted as permitting a client to deposit his records with his accountant and thereby immunize them from judicial process. It is not intended that the client be allowed to immunize his documents, records or other items constituting real evidence from judicial process by depositing them with his accountant. Those items of real evidence should be discoverable. There is no Idaho case law

interpreting Idaho Code § 9-203A and reference may be made to Idaho decisions interpreting the lawyer-client privilege where the statutory provisions are similar.

In State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971), the Idaho Court held that the attorney-client privilege under Idaho Code § 9-203(2) refers only to communicative and not "real" evidence and does not permit a client to bury physical evidence by delivering it to his lawyer. It was proper to require the lawyer to produce the items of evidence.

The working papers of the accountant have been recognized by the federal courts as belonging to the accountant and not the property of the client. See, e.g. Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). It seems reasonable to conclude that documents such as these, which are the product of confidential communications, would be protected by the privilege, based on the same policy considerations that protect the "work product" of the attorney. See I.R.C.P. 26(b)(3) and I.C.R. 16(f)(1).

Subsection (b) states the rule of privilege. It confers the privilege on the client and permits him to prevent others, including the eavesdropper, from disclosing the privileged communications. Like the attorney-client privilege, the rule expressly covers confidential communications among the representatives of the client and the accountant, in addition to those directly between accountant and client. In this regard the statutory provision protecting communications "made by the client to him and his advice given thereon" may be expanded, although the statute expressly includes reports, etc. prepared by assistants of the accountant and by implication would include the communications necessary to prepare the reports, etc.

Subsection (c) states who may claim the privilege. It permits the accountant and other designated persons to exercise the claim of privilege on behalf of the client. It further recognizes that the accountant or representative may no longer have that relationship with the client when the question arises and thus provides that the accountant or representative "at the time of the communication" may exercise the claim of privilege of behalf of the client. The statute is silent in this regard.

The presumption provided in the rule applies only to the authority of the designated person to exercise the claim on behalf of the client or former client and not to the validity of the privilege.

6666

Subsection (d) states the exceptions to the rule. It adopts the exceptions provided in the lawyer-client privilege rule. No exceptions are provided in the statute, which not only seems unwise from the client's and the accountant's points of view, but also unjustifiable and against public interest. See Comment to Rule 502 for further discussion of the exceptions.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 9-203A to conform the language of the statute to Rule 515 for application in nonjudicial proceedings.

Superior Court Civil Rules

- ☐ Superior Court Civil Rules
- ☐ 6. TRIALS (Rules 38-53.4)

RULE 45. SUBPOENA

(a) **For Attendance of Witnesses.** The subpoena shall be issued as follows:

(1) *Form.* To require attendance before a court of record or at the trial of an issue therein, such subpoena may be issued in the name of the State of Washington and be under the seal of the court before which the attendance is required or in which the issue is pending: *Provided, That* such subpoena may be issued with like effect by the attorney of record of the party to the action in whose behalf the witness is required to appear, and the form of such subpoena in each case may be the same as when issued by the court except that it shall only be subscribed by the signature of such attorney.

(2) *Issuance for Trial* To require attendance before a court of record or at the trial of an issue of fact, the subpoena may be issued by the clerk in response to a praecipe or by an attorney of record.

(3) *Issuance for Deposition.* To require attendance out of such court before a judge, justice of the peace, commissioner, referee or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state, it shall be issued by an attorney of record or by such judge, justice of the peace, commissioner, referee or other officer before whom the attendance is required.

(b) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) **Service.** A subpoena may be served by any suitable person over 18 years of age, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode. When service is made by any other person than an officer authorized to serve process, proof of service shall be made by affidavit.

(d) **Subpoena for Taking Depositions; Place of Examination.**

(1) *Authorization.* Proof of service of a notice to take a deposition as provided in rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the attorney of record or the officer taking the deposition of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by rule 26(b), but in that event the subpoena will be subject to the provisions of rule 26(c) and section (b) of this rule.

**AFFIDAVIT OF MERLYN CLARK IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL
AND IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) *Place of Examination.* A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A nonresident of the state may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service or at such other convenient place as is fixed by an order of the court.

(3) *Foreign Depositions for Local Actions.* When the place of examination is in another state, territory, or country, the party desiring to take the deposition may secure the issuance of a subpoena or equivalent process in accordance with the laws of such state, territory or country to require the deponent to attend the examination.

(4) *Local Depositions for Foreign Actions.* When any officer or person is authorized to take depositions in this state by the law of another state, territory or country, with or without a commission, a subpoena to require attendance before such officer or person may be issued by any judge or justice of the peace of this state for attendance at any places within his jurisdiction.

(e) *Subpoena for Hearing or Trial.* [Reserved. See RCW 5.56.010.]

(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

(g) *When Excused.* A witness subpoenaed to attend in a civil case is dismissed and excused from further attendance as soon as he has given his testimony in chief and has been cross-examined thereon, unless either party moves in open court that the witness remain in attendance and the court so orders; and witness fees will not be allowed any witness after the day on which his testimony is given, except when the witness has in open court been required to remain in further attendance, and when so required the clerk shall note that fact in the minutes.

[Amended effective July 1, 1972; September 1, 1983; September 1, 1993.]

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FILED

2009 AUG 18 AM 10 07

PATTY O. WEEKS
CLERK OF THE DIST. COURT
Cheri Metcalf
DEPUTY.

Merlyn W. Clark, ISB No. 1026
 D. John Ashby, ISB No. 7228
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Attorneys for Defendant William V. McCann, Jr.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and GARY E.
 MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK
 COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

OBJECTION AND MOTION TO
 STRIKE INADMISSIBLE
 STATEMENTS IN AFFIDAVIT OF
 TIMOTHY ESSER

I. INTRODUCTION

Plaintiff has filed the Affidavit of Timothy Esser in support of his Motion to Compel Discovery. The Affidavit contains many statements that are inadmissible and should be stricken and disregarded by the court.

II. LEGAL AUTHORITIES

“ * * * The averment of facts in an affidavit to be used in judicial proceedings must be sufficiently definite to warrant the judicial action sought, and such facts must be stated as warrant the court in drawing the legal conclusions sought to be established. Averments which merely state opinions or legal conclusions or characterizations, speculations, and inferences, instead of facts are insufficient.” *State v. Snyder*, 88 Idaho 479, 483, 401 P.2d 548, 550 (1965). See also *Craig v. Lane*, 60 Idaho 178, 89 P.2d 1008 (1938)(affidavit that stated mere conclusions was insufficient).

In at least one case, the Idaho Supreme Court applied the Rule 56(e) standards for affidavits in summary judgment proceedings to a nonsummary judgment proceeding involving a petition for post conviction relief. See, e.g., *Ivey v. State of Idaho*, 123 Idaho 77, 844 P.2d 706 (1992)(rehearing denied, 1993). In *Ivey*, the Court ruled that a petition for post conviction relief must be supported by affidavit or equally reliable evidence and that the affidavit must satisfy Rule 56(e) of the Idaho Rules of Civil Procedure, which requires the affidavit to be made on personal knowledge setting forth facts that would be admissible at trial.

In a more recent case, the Idaho Supreme Court ruled that the district court need not apply the Rule 56(e) standards to an affidavit in support of a motion for new trial. *Obendorf v. Terra Hug Spray Company, Inc.*, 145 Idaho 892, 188 P.3d 834 (2008). Inexplicably, no mention is made of *State v. Snyder*, *Craig v. Lane*, or *Ivey v. State*. Although unwilling to apply the Rule

56(e) standards to an affidavit in support of a motion for new trial, the Court in *Obendorf* stated:

We do not suggest that the trial court must blindly accept every fact or conclusion advanced in an affidavit in support of a new trial that would not be admissible in evidence. To the contrary, the trial court may consider evidentiary deficiencies in evaluating the weight, if any, to be given an affidavit that would not be admissible in evidence.

145 Idaho at 905 FN5, 188 P.3d at 843 FN5 (2008). Affidavits which consist only of conjecture, conclusory allegations as to ultimate facts, or conclusions of law provide no reliable facts and ought be disregarded by this court. See, e.g., *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782 P.2d 1192 (1992). Furthermore, conclusory statements, statements based on hearsay, statements that lack adequate foundation, and statements not made on personal knowledge are insufficient to establish reliable facts and should be disregarded by the court. See, e.g., *State v. Shama Resources Ltd. Prtns.*, 127 Idaho 267, 899 P.2d 977 (1995)(statements made by an affiant regarding the knowledge or beliefs of persons other than the affiant were insufficient).

If an affidavit contains some inadmissible matter, the whole affidavit need not be stricken or disregarded; a court may strike or disregard the inadmissible part and consider the rest of the affidavit. See *Marty v. State*, 122 Idaho 766, 769, 838 P.1384, 1387 (1992).

III. INADMISSIBLE STATEMENTS

Defendant McCann is asking this court to strike and disregard or at least to disregard the following inadmissible statements in the Affidavit of Timothy Esser because they are merely statements of opinions, legal conclusions or characterizations, speculations and inferences, instead of facts or they are inadmissible hearsay and based on the knowledge and beliefs of persons other than affiant:

OBJECTION AND MOTION TO STRIKE INADMISSIBLE STATEMENTS IN AFFIDAVIT OF TIMOTHY ESSER - 3

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Page 2: It is our contention, and we believe is fully supported by a review of the attached documents, that the Defendants have consistently engaged in a squeeze out pattern which includes providing improper financial benefits to Gertrude McCann, in lieu of declaring dividend, in order to satisfy her financial needs and yet deprive Plaintiff of a rightful return on his investment.

Page 4: We believe that William McCann was paid by the Corporation in the year 2000 and we believe it is likely that Gertrude was as well.

Page 5: This was phony, the Defendants knew it, and attorney Green (since deceased) advised them to stop. But the evidence will show they did not stop. They continued their pattern of engaging in fraudulent methods of providing compensation to Gertrude without declaring dividends in order to squeeze out Ron McCann. The history of this pattern is necessary to explain the rationale for later transactions of a similar nature.

Page 6: So, we conclude that since the death of McCann Sr., in order to provide income to Gertrude McCann and at the same time deny dividends to Ron McCann, the Corporation and its controlling shareholders, William McCann, Jr., and Gary Meisner, commenced a pattern of oppression. Initially, in 1997, 1998, 1999 and apparently 2000, they had the Corporation pay substantial compensation to Gertrude McCann even though as she testified at her deposition she did nothing to earn it.

The oppressors then voted, in their shareholder capacities to provide Gertrude a lifetime annuity. However, after being advised by Corporate Counsel Green that this could expose them to personal liability, wearing their director hats, they decided not to proceed in that manner. So, they came up with other schemes.

Page 7: Why has the corporation not collected its receivable from Gertrude and instead in 2006 gives her a \$106,000 note for "12-1/2 years of back rent"?

Page 9: Bill pays Gertrude from his own pocket – rather than managing the Corporation in a manner that benefits its shareholders and at the same time, his salary as President is increased by almost the same amount he agrees to pay Gertrude.

Mr. Reinstein explains that work papers include data and documents, including memoranda and requests, received by the CPA from her client and data and documents generated by the CPA internally in providing these services. He advises that it is common that when a firm switches CPAs or seeks assistance from another CPA for one CPA to visit the office of the other and to review that person's work papers. He advises that there is no CPA/client privilege such as between attorney and a client. He advises that entries on tax returns which may appear as legitimate business expenses should have underlying documentation to support that characterization. He advises it is relevant to review the underlying

documents and data relating to the financial transactions between the Corporation and its President, William McCann, Jr., and the Corporation and Gertrude McCann.


IV. CONCLUSION

The statements in Mr. Esser's Affidavit that are quoted above provide no reliable facts and are clearly inadmissible evidence because they are merely statements of opinions, legal conclusions or characterizations, speculations and inferences, instead of facts. Moreover, the statements attributed to Mr. Reinstein are clearly inadmissible hearsay. For these reasons, the statements in Mr. Esser's Affidavit that are quoted above should be stricken and disregarded or at least disregarded by the Court in its consideration of the Plaintiff's Motion To Compel Discovery.

DATED THIS 18th day of August, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By


Marilyn W. Clark, ISB No. 1026
Attorneys for Defendant William V. McCann,
Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of August, 2009, I caused to be served a true copy of the foregoing OBJECTION AND MOTION TO STRIKE INADMISSIBLE STATEMENTS IN AFFIDAVIT OF TIMOTHY ESSER by the method indicated below, and addressed to each of the following:

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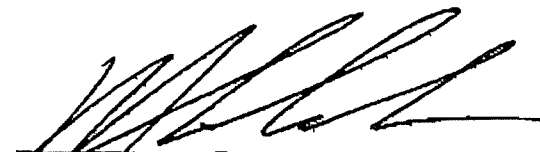
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)
)
Plaintiff,)

v.)

WILLIAM V. McCANN, JR., and)
GARY E. MEISNER, individually)
as a director of McCann Ranch)
Livestock Company, Inc., and as a)
shareholder of McCann Ranch &)
Livestock, Inc., in his capacity as)
Trustee of the William V. McCann,)
Sr. Stock Trust,)

Defendants,)

McCANN RANCH &)
LIVESTOCK COMPANY, INC.,)

Nominal Defendant.)

No. CV08-01226

PLAINTIFF'S RESPONSIVE
DISCOVERY MEMORANDUM

/

/

FILED
2009 AUG 19 AM 8 36
PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

The defense misstates the facts and ignores black letter law.

Pre-2001 Events

The facts. It is Plaintiff's contention that financial benefits provided to Gertrude McCann post-2001 constitute a continuation of a pattern of oppression initiated before then – a pattern motivated by Bill McCann's fraternal ill will – a business plan designed to avoid paying dividends, to avoid providing Plaintiff with the reasonably expected return on his share ownership and investment.

A history of the transactions between the Corporation and Gertrude McCann disclose that as soon as a particular transaction is identified as phony – and a stop put to it, the controlling shareholders, Bill McCann and Gary Meisner, come up with a different scheme. For example, in 2006 the Corporation executes a promissory note payable to Gertrude McCann in the amount of \$106,000, but pre-dates it to the year 2000. Why? For example, in the year 2000, the Corporation votes to purchase Gertrude McCann's home, yet provide her with a life estate and "maintenance" income. In later years, once the house payments had been completed, Gertrude McCann is in need of cash flow. What does the Corporation do? It votes to increase her monthly "maintenance" from \$400 all the way to \$1,500. **To understand the year 2009 Resolution increasing this maintenance payment, to appreciate that it is in reality a phony, undeclared dividend, one must be aware of and understand the motive and intentions involved in the underlying year 2000 house purchase.**

Black Letter Law

Rule 26(b)(1) provides, "... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Plaintiff needs to conduct discovery of pre-2001 transactions to learn what facts exist which would lend significance to or clarify post-2001 events.

Facts. In 2006 the Corporation received a promissory note from Gertrude McCann by which she agreed to pay to the Corporation \$165,000. No payments have been made thereon. The answers given by the corporation to our interrogatory requests for an explanation of how this sum was calculated suggests that it includes a stream of benefits provided to Gertrude McCann from the Corporation both before and after year 2001. At her deposition, Gertrude McCann said she owes the Corporation nothing. Pre-2001 history must be examined to determine whether this note is phony. Gertrude McCann Deposition, pgs 37 and 38, filed herewith.

The law. From the defense memorandum, one would think their motion for dismissal alleging res judicata had been granted when in fact it was denied. The Idaho Supreme Court, in a case in which the sole issue was what res judicata effect, if any, should a prior determination be given, specifically adopted the Second Restatement of Judgments, which cites this example:

Change of circumstances. Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first. See Illustrations 10-12.

Illustration (12). The government fails in an action against a defendant under an antitrust statute for lack of adequate proof that the defendant participated in a conspiracy to restrain trade. The government is not precluded from a second action against the same defendant in which it relies on conspiratorial acts post-dating the judgment in the first action, **and may rely also on acts preceding the judgment insofar as these lend significance to the later acts.** [emphasis supplied] Second Restatement of Judgments, Section 24(f) adopted in Aldape Jr. v. Akins, 105 Idaho 254 (1983)).

The defense doesn't even mention, let alone distinguish why this black letter law does not control. This Court has stated it expects to review post-2001 transactions. It is certainly Plaintiff's contention that its current causes of action, not previously brought and certainly not dismissed, are fully supported by post-2001 facts. To understand the full significance of these events and to discover and understand the Defendants' current motives and intentions conduct which commenced before 2001, needs to be explored.

Whether such conduct will be admissible at trial can only be determined after such conduct is discovered and after Plaintiff has had the opportunity to lay a proper foundation at trial. Defendant's motions amount to premature motions in limine to exclude evidence. The Plaintiff surely should be allowed to discover events, facts, documents which explain post-January 2001 occurrences.

CPA Dorothy Snowball's Work Papers

Facts. Plaintiff wishes to present the live testimony of Dennis Reinstein, a Boise CPA Plaintiff has retained as its forensic expert. Mr. Reinstein will explain what work papers are, that they are consistently shared between CPAs and why they are relevant – necessary to explain/understand the final work product, for example, deductions taken on tax returns.

The law. The defense cites the CPA privilege contained in Idaho Rule of Evidence 515. Inexplicably, the defense fails to cite the exception to this privilege set forth in Evidence Rule 515(6). The privilege does not apply in actions brought by a shareholder alleging breach of fiduciary duties, unless the evidence sought was prepared in response to this very litigation:

Evidence Rule 515(d) Exceptions. There is no privilege under this rule:

(1) – (5)

As to communication between a corporation and its accountant or a representative of the accountant, which was not made for the

purpose of facilitating the rendition of professional accounting services to the corporation during the litigation and concerning the litigation in which the privilege is asserted: (A) in an action by a shareholder against the corporation which is based on a breach of fiduciary duty; or (B) in a derivative action by a shareholder on behalf of the corporation provided that disclosure of privileged communications under either subpart (A) or (B) of this exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court may use in camera inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure.

CONCLUSION

Defendants' today object to portions of my affidavit. To the extent that the Court considers any portion of my affidavit to be argumentative or conclusory, please consider it to be part of this memorandum.

This Court should allow discovery of pre-2001 information which is relevant to understand post-2001 events and supports the pending causes of action.

RESPECTFULLY SUBMITTED this 18th day of August 2009.

By Tim Esser
Timothy Esser #6770

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August 2009, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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Boise, ID 83701-1617

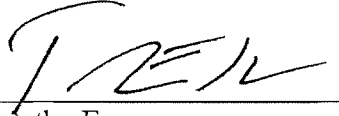
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Attorneys for Plaintiff

FILED
2009 AUG 19 AM 9 36
PATTY G. WEEKS
CLERK OF THE DISTRICT COURT
James [Signature]
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)
)
Plaintiff,)

v.)

WILLIAM V. McCANN, JR., and)
GARY E. MEISNER, individually)
as a director of McCann Ranch)
Livestock Company, Inc., and as a)
shareholder of McCann Ranch &)
Livestock, Inc., in his capacity as)
Trustee of the William V. McCann,)
Sr. Stock Trust,)

Defendants,)

McCANN RANCH &)
LIVESTOCK COMPANY, INC.,)

Nominal Defendant.)

WASHINGTON STATE)

COUNTY OF WHITMAN)

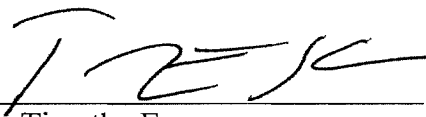
No. CV08-01226

SUPPLEMENTAL AFFIDAVIT OF
TIMOTHY ESSER

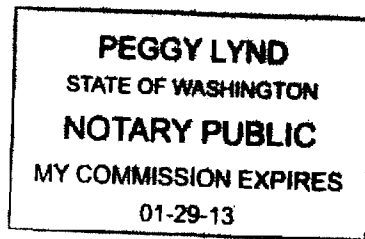
Timothy Esser on oath, says:

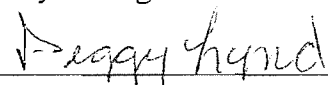
I deposed Gertrude McCann on July 15, 2009. I attach pages 34 through 41 of her deposition testimony. The attached transcription is accurate. The testimony referred to in my responsive memorandum is found on pages 37 and 38.

DATED: This 18th day of August 2009.


Timothy Esser

Subscribed and sworn to before me this 15th day of August 2009.




Notary Public in and for the
State of Washington.

Commission expires: 1-29-09

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August 2009, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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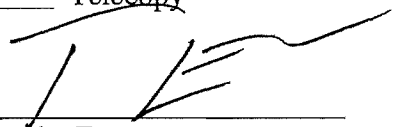
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Timothy Esser

IN THE DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs

WILLIAM V. McCANN, JR., and
Gary E. Meisner, individually
as a director of McCann Ranch
Livestock Company, Inc., and
as a shareholder of McCann
Ranch & Livestock, Inc., in
his capacity as Trustee of the
William V. McCann, Sr. Stock
Trust,

Defendants,

MCCANN RANCH & LIVESTOCK
COMPANY, INC.,

Nominal Defendant.

Case No. CV08-01226

COPY

Taken at 141 Ninth Street
Lewiston, Idaho
Wednesday, July 15, 2009 - 9:04 a.m.

D E P O S I T I O N

OF

GERTRUDE McCANN

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1 Q. He doesn't write you letters about the
2 corporation?

3 A. No, he doesn't write me letters. That's the
4 only letter we ever had between us.

5 Q. That's what he tells me.

6 A. Well, that's the truth.

7 MR. McNICHOLS: Are you telling the witness
8 that that's what Mr. Meisner told you?

9 MR. ESSER: I -- for the record, I've asked Mr.
10 Meisner to produce all correspondence between he and
11 Gertrude McCann, and the only production that was given
12 is Exhibit No. 1.

13 MS. McCANN: That one, yeah, that's right.

14 MR. McNICHOLS: Understood.

15 MS. McCANN: That's exactly right.

16 Q. (BY MR. ESSER) Do you use a computer? Do
17 you --

18 A. No. I don't even own one.

19 Q. So you don't e-mail?

20 A. No, I don't.

21 Q. Did the corporation build a shop up by your
22 house or a garage or something?

23 A. We got one built there. I don't know who paid
24 for it but.

25 Q. Describe this building.

1 A. It's just a garage. The whole -- it has one
2 for the motor home and two for -- three different
3 stalls.

4 Q. Who owns the motor home?

5 A. McCann Ranch and Livestock, I suppose.

6 Q. Who uses the motor home?

7 A. Nobody has used it for years. It's set there
8 for, I don't know, twenty-five years probably, never
9 been used. And it's a darn good one.

10 Q. Did -- was it purchased while your husband was
11 alive or --

12 A. Yes, it was. We used it.

13 Q. And, when your husband was alive, where was it
14 stored?

15 A. Right where it is now, in that building.

16 Q. So that building was built while your husband
17 was alive?

18 A. Oh, yes, long time ago. I don't know when it
19 was built, but it's been there quite a while.

20 Q. And it stores a motor home. What else is it
21 used --

22 A. I've got my pickup in there and the ton truck
23 and another pickup and a lot of other stuff. It's a
24 usable thing.

25 Q. Did you think the corporation should rent that

1 ground from you that the, that the building sits on?

2 A. I don't care what they do. I just want to
3 live, that's all.

4 Q. Okay.

5 A. I'm ninety-three, and I'm working on
6 ninety-four.

7 Q. Well, I'm going to keep moving here, and get
8 you on with your life here pretty quick.

9 A. You better not be gone with it. I'm going to
10 live longer.

11 Q. I'm going to hand you another document. We'll
12 call it Exhibit No. 3.

13 EXHIBITS:

14 (Deposition Exhibit No. 3 marked for
15 identification.)

16 Q. Now, Gertrude, do you see it says, promissory
17 note, a hundred and sixty-five thousand, three hundred
18 forty-one dollars and forty-nine cents, Lewiston, Idaho,
19 January 1st, 2006. It says, for value received in
20 lawful money of the United States of America, I promise
21 and agree to pay the McCann Ranch one hundred sixty-five
22 thousand, three hundred forty-one dollars, forty-nine
23 cents. Do you see that?

24 A. Where? No. This up here?

25 MR. AHERIN: It's not the agreement. He

1 started right there (indicating).

2 MS. McCANN: Right here?

3 MR. AHERIN: Yeah.

4 A. That I promise to do that?

5 Q. (BY MR. ESSER) Yeah. Would you look at the
6 second page, please?

7 A. I did not promise to do anything.

8 Q. Is that your signature?

9 A. Yep.

10 Q. So, as I read this, it says you received in
11 lawful money of the United States a hundred sixty-five
12 thousand, three hundred forty-one dollars, and you agree
13 to pay it back in lawful money of the United States.
14 What can you tell me about this?

15 A. I don't even remember it.

16 Q. Did you --

17 A. How can I tell you anything? I don't remember
18 doing this. That's my writing.

19 Q. It says as of 2006, January 1st, 2006, it says,
20 you owe and you agree to pay back to the corporation a
21 hundred and sixty-five thousand dollars. Did you
22 receive a hundred and sixty-five thousand dollars from
23 the corporation that you owed them for?

24 A. Not to my knowledge.

25 Q. What --

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1 A. Somebody had to tell me to do that, because I
 2 never read it. I don't owe them nothing.
 3 Q. Did Ron tell you to sign that?
 4 A. No, I don't think so. I don't think it was
 5 him.
 6 Q. Did Gary Meisner tell you to sign that?
 7 A. I don't know who it was.
 8 Q. Did Bill tell you?
 9 A. When was this?
 10 Q. January 1st, 2006.
 11 A. January '06, three years ago. I don't remember
 12 this.
 13 Q. Mrs. McCann, what I'm trying to figure out, if
 14 this document means what it says, I'm trying to figure
 15 out why you would owe the corporation a hundred and
 16 sixty-five thousand dollars?
 17 A. I don't owe them a dime. In my book, I don't
 18 owe them nothing. They owe me.
 19 Q. What do they owe you for?
 20 A. Living, living expenses. That's what they owe
 21 me for.
 22 Q. And why is that?
 23 A. Because I helped make that.
 24 Q. You helped make the corporation?
 25 A. I helped make what is made.

1 Q. And do you feel that the corporation is
 2 treating you fairly?
 3 A. No.
 4 Q. Here's --
 5 A. Because we have too many expenses and lawsuits
 6 to make any money off of that thing.
 7 Q. What are the -- what's the lawsuits about?
 8 A. I don't know. This is the first one I had
 9 anything to do with. I don't know anything about them.
 10 Q. What is this lawsuit all about?
 11 A. I don't know. That's what I wonder. I don't
 12 do anything to deserve any of this.
 13 Q. Has anybody explained to you what this
 14 lawsuit's about?
 15 A. Yes. But I didn't pay any attention.
 16 Q. Who's explained to you what this lawsuit is
 17 about?
 18 A. This man right here.
 19 Q. Well, I don't want to know what Mr. Aherin told
 20 you. Or I would like to know, but I'm not allowed to
 21 ask that. What has Bill, Junior, told you?
 22 A. Bill, Junior, doesn't say anything about it.
 23 He respects me.
 24 Q. What's Ron told you about it?
 25 A. Nothing.

1 Q. Looking at some records of the corporation,
 2 I -- I see where the corporation provided benefits to
 3 you down through the years, and but I can't tell if they
 4 claim that you owe that back to them or not. We haven't
 5 been able to figure that out. That's what --
 6 A. I don't owe them a dime.
 7 Q. Okay. What benefits -- does the corporation
 8 pay for your car?
 9 A. No, I paid for it myself.
 10 Q. Does the corporation pay for your gas?
 11 A. Yes.
 12 Q. How does -- do you have a credit, a corporate
 13 credit card?
 14 A. Yes, I do.
 15 Q. And you can charge gas with it?
 16 A. I do charge gas with it.
 17 Q. Okay. Is it a VISA or a Master Card, what,
 18 what is it?
 19 A. I don't know. It gets me there. That's all I
 20 care.
 21 Q. Do you have it with you?
 22 A. Yes, I do.
 23 Q. Can I see it, please?
 24 A. It's McCann Ranch and Livestock.
 25 Q. And that's the only thing I'm going to ask for

1 you to pull out of your wallet, Mrs. McCann.
 2 A. Yeah, that better be.
 3 Q. Now this one says William McCann. It doesn't
 4 say the corporation.
 5 A. Well, he's -- he is it.
 6 Q. But that's the one you use?
 7 A. Yes, that's the one I use.
 8 Q. Okay. Can I see it again, please? I want to
 9 write down the number.
 10 MR. McNICHOLS: Well, I guess you won't. I
 11 guess we don't have to worry about you using it but....
 12 MR. ESSER: I thought you represent the
 13 corporation.
 14 MR. SCHWAM: He's worried about you using it.
 15 MR. ESSER: Oh, well, I'm not about to use it.
 16 Q. (BY MR. ESSER) That's the credit card you use
 17 to pay for things?
 18 A. That's the only thing I pay for on that is gas.
 19 Q. Gas.
 20 A. I use my own money, what I get.
 21 Q. Do you take trips from time to time?
 22 A. I intend to, too.
 23 Q. And, Sandy Scott helps you with those, booking
 24 those and....
 25 A. She is the guide. She is the one that runs

686

Michael E. McNichols
CLEMENTS, BROWN & McNICHOLS, P.A.
Attorneys at Law
321 13th Street
Post Office Box 1510
Lewiston, Idaho 83501
(208) 743-6538
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ISB No. 993

FILED
2009 AUG 19 PM 2 30
PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

Attorneys for Defendant Gary Meisner

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)	
	)	Case No: CV 08-1226
Plaintiff,)	
	)	MOTION FOR
vs.	)	PROTECTIVE ORDER
)	
WILLIAM V. McCANN, JR., and)	
GARY E. MEISNER,)	
)	
Defendants,)	
)	
McCANN RANCH & LIVESTOCK)	
COMPANY, INC.,)	
)	
Nominal Defendant.)	

Defendant Gary E. Meisner moves the Court, pursuant to Rule 26(c)

I.R.C.P., for a protective order limiting discovery to events and transactions occurring after January 5, 2001, the date on which plaintiff's prior complaint was dismissed with prejudice.

Defendant Gary E. Meisner incorporates by reference the MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL filed by defendant William V. McCann, Jr.

DATED this 19th day of August, 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By: 
MICHAEL E. McNICHOLS

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Timothy Esser
Libey, Ensley, Esser & Nelson, PLLC
Attorneys at Law
520 East Main Street
Pullman, WA 99163
Facsimile: (509) 334-2205

Andrew Schwam
Schwam Law Offices
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Charles F. McDevitt
Dean J. Miller
McDevitt & Miller, LLP
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Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley
P.O. Box 1617
Boise, ID 83701
Facsimile: (208) 342-3829

_____ U.S. MAIL
_____ HAND DELIVERED
_____ OVERNIGHT MAIL
☒ TELECOPY (FAX)



Michael E. McNichols

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)
)
PLAINTIFF,)

V.)

WILLIAM V. McCANN, JR., AND)
GARY E. MEISNER, INDIVIDUALLY)
AND AS DIRECTOR OF McCANN)
RANCH & LIVESTOCK COMPANY,)
INC., AND AS A SHAREHOLDER OF)
McCANN RANCH & LIVESTOCK)
COMPANY, INC., IN HIS CAPACITY)
AS TRUSTEE OF THE WILLIAM V.)
McCANN SR. TRUST,)

DEFENDANTS,)

McCANN RANCH & LIVESTOCK)
COMPANY, INC.,)

NOMINAL DEFENDANT.)

CASE NO. CV 08-01226C
SECOND MEMORANDUM AND
ORDER CONCERNING
DISCOVERY

*Filed in chambers
8/31/09 11⁰⁰ AM MDT
Ray W. Myers
Senior District Judge*

This is an on-going dispute between Plaintiff Ronald McCann and his brother William McCann Jr., concerning the operation of McCann Ranch & Livestock Company, Inc., a closely-held corporation created by their father many years ago. An earlier case involving this dispute was decided by The Idaho Supreme Court in *McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002). In the current action the plaintiff's remaining unresolved claim is for forced dissolution of the corporation.

The plaintiff previously moved to compel discovery, and the court granted his motion with respect to certain items of correspondence generated since January 5,

2001 (the date of dismissal of the first action), to certain financial transactions occurring since January 5, 2001, to certain financial benefits received since January 5, 2001, to certain annual returns since January 5, 2001, and to certain minutes of meetings conducted since January 5, 2001.

The plaintiff has filed a new motion to compel. The defendants have moved for protective orders limiting on-going discovery to events and transactions occurring after January 5, 2001, and prohibiting inspection and copying of documents in the possession of the certified public accountant that provided and provides accounting services to Defendant McCann Ranch and Livestock Company. IRCP Rule 26(c). Defendant William McCann, Jr., also moved to strike portions of the affidavit submitted in support of the plaintiff's motion. During oral argument he withdrew the motion to strike.

The plaintiff's motion encompasses two matters: the scope of examination of various deposition witnesses; and the review of records in the possession of the certified public accountant that provided and provides accounting services to the corporate defendant.

In ruling on the competing motions, the court is mindful of the Supreme Court's comment in *McCann I* that the plaintiff may assert "new" claims "that may arise following the order of dismissal." *McCann v. McCann*, 138 Idaho at 232, fn. 2.

SCOPE OF EXAMINATION OF DEPOSITION WITNESSES

In a previous discovery order the court ruled that the defendants need not respond to interrogatories and requests for production relating to correspondence, financial benefits, financial transactions, rates of interest, and minutes of corporate meetings occurring, generated, or received on or before January 5, 2001, the date of dismissal of the prior McCann case.

The first part of the plaintiff's current motion requests an order "authorizing Plaintiff to inquire of deponent witnesses, such as representatives of the Defendant Corporation, Defendant William McCann, Jr., Defendant Gary Meisner, and others concerning matters which occurred before January 5, 2001." Gertrude McCann is the widow of William McCann, Sr., and the mother of Plaintiff Ronald McCann and Defendant William McCann, Jr.

By way of example the plaintiff suggests that the following issues can be understood only if events prior to January 6, 2001 are "investigated in order to understand the significance of events which occurred thereafter."

1. Mutual promissory notes executed in 2006 by the defendant corporation and Mrs. McCann, Sr.
2. Consulting fees paid by the defendant corporation between 1997 and 2000.
3. The board of directors' meeting of the defendant corporation held on September 6, 2000.
4. Past due rental for a shop as recited in the minutes of the September 6, 2000, meeting of the board of directors of the corporate defendant.
5. Ongoing rent for land on which the shop is located.
6. Purchase of the McCann, Sr., house by the defendant corporation.
7. Increase in monthly payments to Mrs. McCann, Sr., for property maintenance in 2006 and in 2007, as it may relate to the original maintenance transaction of December 2000.
8. Receivables due to the Defendant Corporation from Mrs. McCann, Sr., as a result of transactions or events prior to January 6, 2001.
9. Payments from Defendant William McCann, Jr., and his wife Lori to Mrs. McCann, Sr.

The defendants do not object to inquiry about pre-January 6, 2001, events and transactions directly related to the mutual execution of promissory notes in 2006 and to the corporate purchase of the McCann, Sr., house. They do object to inquiry about pre-January 6, 2001, transactions and events not directly related to those two matters, and they seek a protective order to that effect.

As the court understands the situation, the proposed depositions have been delayed so that the parties may know how to proceed without the necessity of interrupting depositions to obtain specific rulings. Thus, insofar as the motion to compel relates to proposed depositions, the motion is not strictly a motion to compel but more in the nature of a motion for an advisory opinion on the conduct of the depositions.

Unless otherwise limited by the court in accordance with the Rules of Civil Procedure, parties may obtain discovery on any unprivileged matter that is relevant to the subject matter of the litigation. The information sought need not be admissible at trial, so long as it appears reasonably calculated to lead to the discovery of admissible evidence. IRCP Rule 26(b)(1). In general, control of discovery is within the discretion of the court. *Jen-Rath Co., Inc. v Kit Mfg. Co.*, 137 Idaho 330, 336, 48 P.3d 659 (2002). The decision whether or not to grant a protective order is discretionary. *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 104, 996 P.2d 798 (2000).

While the court carefully has considered the plaintiffs arguments, it nevertheless concludes that inquiry into events and transactions occurring prior to January 6, 2001, does not appear to be reasonably calculated to lead to the discovery of admissible evidence, except with respect to inquiry concerning pre-January 6, 2001, events and transactions directly related to the mutual execution of promissory notes in 2006 and to the corporate purchase of the McCann, Sr., house. Consequently

inquiry during depositions concerning pre-January 6, 2001, events and transactions shall be limited to events and transactions directly relating to the mutual execution of promissory notes in 2006 and to the corporate purchase of the McCann, Sr., house. An order to that effect will issue.

DOCUMENTS IN THE POSSESSION OF THE CORPORATE CPA

In the second part of his motion the plaintiff seeks an order "requiring the Corporation to allow Plaintiff's experts, Boise CPA Dennis Reinstein and his associate, Karen Gannett, access to work papers of the corporate CPA, Dorothy Snowball."

The defendants have characterized this part of the plaintiff's motion as a rummaging request not countenanced by the Rules of Civil Procedure. While the procedure outlined in Rule 34(b) may not have been followed, the court will treat this part of the plaintiff's motion as being in the nature of a motion to compel production and inspection of documents.

Under IRCP rule 34(a), a party to an action may request another party to produce and allow the requesting party, or someone acting on that party's behalf, to inspect and copy designated documents that are in the possession, custody, or control of the other party. While the requested documents are not within the actual physical possession or custody of the corporate defendant, they clearly are within its control.

Although Defendant William McCann's originally argued in his pre-hearing memorandum that the "work product" protection applied, none of the defendants now contend that the documents amount to work product prepared in anticipation of litigation or prepared for trial. IRCP 26(b)(3). Rather they contend that the documents are protected by the accountant-client privilege. IRE Rule 515. The plaintiff argues that IRE Rule 515(d)(6) exempts his request for production from the

operation of the privilege.

Based on the record now before the court it is impossible to determine whether the privilege applies to some, all, or none of the requested documents.

The court will order that production, inspection, and copying of the documents will be carried out at a time and place agreeable to the plaintiff and the corporate defendant, subject to the following limitation:

To the extent that the corporate defendant believes any document to be subject to the privilege, it may withhold the document from inspection and copying, and it will prepare and maintain a privilege log specifying any document withheld, the general nature of the document, and the basis on which the privilege is asserted. Upon submission of the privilege log to the court, the court will determine whether the privilege is well taken or whether the court will need to review the document or documents for which the privilege has been asserted.

ORDER

It hereby is ordered as follows:

1. With respect to the motion to compel and the motions for protective orders concerning the examination of potential deposition witnesses, the witnesses will not be questioned about events or transactions occurring before January 6, 2001, except that deposition witnesses may be questioned about pre-January 6, 2001, events and transactions directly related to the mutual execution of promissory notes in 2006 and to the corporate purchase of the McCann, Sr., house.

2. With respect to the motion for production and inspection and the motions for protective orders concerning work papers of CPA Dorothy Snowball prepared in connection with work for Defendant McCann Ranch and Livestock Company, Inc., production, inspection, and copying of the documents will be carried out at a time and place agreeable to Plaintiff Ronald R. McCann and to Defendant McCann Ranch and Livestock Company, Inc., subject to the following limitation:

To the extent that the corporate defendant believes any document to be subject to the accountant-client privilege, it may withhold the document from inspection and copying, and it will prepare and maintain a privilege log specifying any document withheld, the general nature of the document, and the basis on which the privilege is asserted. Upon submission of the privilege log to the court, the court will determine whether the privilege is well taken or whether the court will need to review the document or documents for which the privilege has been asserted

August 31, 2009


George D. Carey, Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing SECOND MEMORANDUM AND ORDER CONCERNING DISCOVERY was:

✓ FAXED by the undersigned at Lewiston, Idaho, this 31 day of August 2009, to:

Michael McNichols
Merlyn Clark
Chas. McDevitt

Timothy Esser
Andrew Schwam

PATTY O. WEEKS, CLERK

By: _____



MEMORANDUM AND ORDER
CONCERNING DISCOVERY

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Attorneys for Plaintiff

FILED
2009 SEP 18 AM 9 04

PATRICIA W. WILSON
CLERK OF THE DISTRICT COURT
Patricia W. Wilson
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,
Plaintiff,

v.

WILLIAM V. McCANN, JR., and
GARY E. MEISNER, individually
as a director of McCann Ranch
Livestock Company, Inc., and as a
shareholder of McCann Ranch &
Livestock, Inc., in his capacity as
Trustee of the William V. McCann,
Sr. Stock Trust,

Defendants,

McCANN RANCH &
LIVESTOCK COMPANY, INC.,

Nominal Defendant.

No. CV08-01226

PLAINTIFF'S MOTION TO AMEND
AMENDED COMPLAINT

Pursuant to I.R.C.P. 15, Plaintiff moves this Court to amend the Amended Complaint on
file herein, to add a derivative cause of action, and in particular, to add the following allegations

and prayer for relief. This motion is supported by the court documents on file herein and the affidavit of Timothy Esser filed herewith. Plaintiff notes as an explanation for the bringing of this motion that the trial Judge herein, The Honorable George D. Carey, on March 4, 2009, by a Memorandum and Order of same date, dismissed Plaintiff's first cause of action stating at page 8 of the Memorandum and Order:

The first cause of action, for breach of fiduciary duties, is conceptually is more difficult to resolve. If there had been no *McCann I* decision, I would be inclined to follow the holding in *Steelman v. Mallory* and conclude that Ronald McCann's claim for breach of fiduciary duties was personal to him and not derivative. *Steelman v. Mallory*, 110 Idaho 510, 716 P.2d 1282 (1986). In *McCann I*, however, the Supreme Court concluded that the duty or duties allegedly breached "do not appear to be a 'special duty owed to the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a shareholder.'" *McCann v. McCann*, 138 Idaho at 233-234. The court concluded that the claims, including breach of duties, were derivative and required compliance with the demand statute. See also, 18B Am Jur 2nd Corporations, Section 1462 (stating that fiduciary duties ordinarily are owed to shareholders collectively and a shareholder can bring only a derivative action for breach).

Looking at the amended complaint, it appears that its allegations of breach of fiduciary duties are similar to those alleged in *McCann I*, but occurring at a later time. The first cause of action, therefore, is derivative in nature notwithstanding the conclusory legal allegations to the contrary. Since there has been no allegation of compliance with the demand statute, the first cause of action will be dismissed.

It is Plaintiff's intent to re-allege the same factual background which supported his original first cause of action, and to seek the same relief originally sought therefore, but to do so per the directive of the Court, i.e., as a derivative action, after having properly followed the derivative action procedures.

The proposed amendment now follows:

THIRD CAUSE OF ACTION: DERIVATIVE CAUSE OF ACTION

43. Paragraphs 1 through 42 of the Amended Complaint for Equitable Relief and

Damages, dated October 14, 2008, are re-alleged.

44. At all material times hereto, since 1997 and before, Plaintiff has continuously been a shareholder in the closely held entity, McCann Ranch & Livestock Company, Inc., an Idaho corporation.

45. Attached as Exhibit 1 is a document entitled Shareholder Ronald McCann's Demand to the Board of Directors, Majority Shareholders and the Corporation, McCann Ranch & Livestock Company, Inc. This document was mailed to and personally served upon the registered agent of the Corporation and the Directors of the Corporation, identified on the first page of said document. Thereafter, attorney Charles McDevitt, acting on behalf of the Corporation, noted that the Demand referenced Idaho Code Section 30-1-~~342~~(1), that this was a typographically error which Plaintiff's counsel confirmed, that the correct citation is 30-1-742(1).

46. The Demand was served on the Corporation and its Directors, between June 11th and June 15th, 2009.

47. Plaintiff's demand was rejected by the Corporation and its Directors by means of a letter dated September 8, 2009, to Plaintiff's counsel, from attorney Charles McDevitt, which incorporated and included the Minutes of a Special Meeting of the Board of Directors held August 28, 2009. A copy of said letter and its enclosures are attached as Exhibit 2.

48. Ninety days have now elapsed from the date the Demand was served upon the Corporation and its Directors and further, Plaintiff shareholder has been notified that the Demand has been rejected.

49. This action is not a collusive one to confer jurisdiction on a Court of the State of Idaho which it would not otherwise have.

50. Plaintiff's efforts to achieve a reasonable return on his ownership interest in the Corporation and/or redemption of his shares in exchange for a proportionate distribution to him of the Corporation's assets has been a many year, unsuccessful effort. Not only has Plaintiff served the attached Demand, which has been rejected, Plaintiff, through his attorneys, have attempted to negotiate a resolution of these issues with Defendants, including attendance at a mediation conducted in 2008, which resulted in settlement proposals being extended by both sides, but no settlement being achieved. The reason Plaintiff's effort at achieving his Demand has not been achieved is because those in control of the Corporation, Defendant William McCann, Jr., and Defendant Gary Meisner, have engaged in a collusive effort to ensure that no meaningful financial benefit be distributed by the Corporation to its shareholders as shareholders. Rather, they have managed the Corporation in a manner to ensure that William McCann and Gertrude McCann have received, and will continue to receive the only meaningful benefits, but not as dividends or payment to redeem shares. In short, Defendants McCann and Meisner have engaged in a multi-year campaign of oppression which has prevented any meaningful shareholder benefits from being distributed.

51. William McCann's and Gary Meisner's multi-year campaign of oppression has included a number of actions or occurrences which could each on its own provide the basis of a derivative action to restore funds to the corporation. However, derivative actions to address these individual occurrences would not address the ongoing scheme to oppress plaintiff and the other shareholders in their capacity as shareholders and would thus accomplish nothing. For this reason plaintiff has not asked to redress a series of individual improper actions but instead has brought this action to seek relief from the ongoing scheme to oppress plaintiff and the other

shareholders in their capacity as shareholders by seeking relief which will eliminate the desire to engage in the oppression.

52. In seeking reorganization as requested in Plaintiff's Demand, Plaintiff does fairly and adequately represent the interests of the Corporation as such reorganization would further the best interests of the corporation and the other shareholders, in their status as shareholders.

53. In seeking reorganization as requested in Plaintiff's Demand, Plaintiff does fairly and adequately represent the interests of the other shareholders in their capacity as shareholders; and plaintiff does fairly and adequately represent the interests of all shareholders, in their capacity as shareholders, similarly situated to plaintiff.

WHEREFORE, Plaintiff seeks, in addition to the relief requested in the Amended Complaint filed herein, the following additional or alternative relief:

5. That the Court order that McCann Ranch & Livestock Company, Inc., and its Board of Directors to enter into a reorganization which accomplishes a spin-off of 36.68% (as determined by current fair market value) of its assets to Ronald McCann, Inc., or other named corporation as selected by Ronald McCann, Inc. with the spin-off to include the following steps and terms:

- a) 36.68% of the assets shall be determined by the use of current market value for each asset and then transferring assets equal to 36.68% of the total.
- b) Ronald McCann will transfer his shares to McCann Ranch & Livestock, Inc., or to Ronald McCann, Inc. who will then transfer to McCann Ranch & Livestock, Inc. -- the method producing the lowest immediate tax consequence will be used.

STATE OF IDAHO)

) ss

County of _____)

Ronald R. McCann, being first duly sworn on oath, deposes and says: That he is the Plaintiff above-named; that he has read the above and foregoing Amended Complaint for Equitable Relief and Damages, knows the contents thereof and that the same is true as he does verily believe.

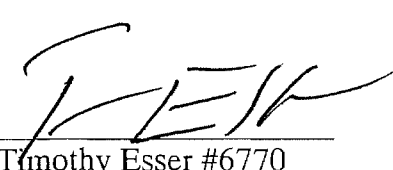
Ronald R. McCann

Signed and sworn to before me on the _____ day of _____,
2008.

Notary Public in and for the State of
Idaho, residing at _____.
My appointment expires _____.

The foregoing sets forth Plaintiff's proposed amendments to his pending complaint.

DATED: This 17th day of Sept, 2009.

By 
Timothy Esser #6770
Attorneys for Plaintiff

Shareholder Ronald McCann's Demand to the Board of Directors, Majority Shareholders and the Corporation, McCann Ranch & Livestock Company, Inc.

- To: McCann Ranch & Livestock Company, Inc., c/o of William McCann, its Registered Agent
- To: William McCann, Jr. as President, Member of the Board of Directors, and Majority Shareholder in McCann Ranch & Livestock Company, Inc.
- To: Gary Meisner as an Officer, Member of the Board of Directors, and Majority Shareholder (re Trustee) in McCann Ranch & Livestock Company, Inc.
- To: Lori Ann McCann as an Officer and Member of the Board of Directors of McCann Ranch & Livestock Company, Inc.
- To: James A. Schoff as an Officer and Member of the Board of Directors of McCann Ranch & Livestock Company, Inc.
- To: All other Officers and Members of the Board of Directors of McCann Ranch & Livestock Company, Inc.

Pursuant to Idaho Code Section 30-1-342(1) and the Idaho Rules of Civil Procedure, Ronald R. McCann, a shareholder in McCann Ranch & Livestock Company, Inc. makes demand as follows:

1. That McCann Ranch & Livestock Company, Inc., and its Board of Directors agree in writing to enter into a reorganization which accomplishes a spin-off of 36.68% (as determined by current fair market value) of its assets to Ronald McCann, Inc., or other named corporation as selected by Ronald McCann, Inc. with the spin-off to include the following steps and terms:
 - a) 36.68% of the assets shall be determined by the use of current market value for each asset and then transferring assets equal to 36.68% of the total.
 - b) Ronald McCann will transfer his shares to McCann Ranch & Livestock, Inc., or to Ronald McCann, Inc. who will then transfer to

McCann Ranch & Livestock, Inc. -- the method producing the lowest immediate tax consequence will be used.

- c) If Ronald McCann and the other required parties do not, within 90-days of service of this notice, agree on all matters necessary to accomplish the spin-off and in fact accomplish the spin-off, then the matter will be submitted to Senior District Judge George Carey in Nez Perce County Civil Case Number CV-08-01226 for determination of all unresolved matters and issuance of all orders necessary to accomplish the spin-off.

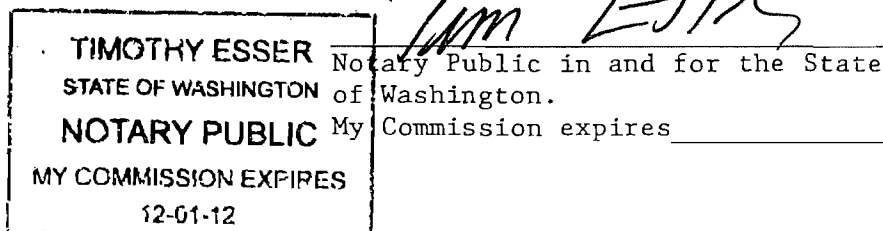
If the Corporation and/or its two controlling shareholders are going to reject the foregoing demand, Ronald McCann asks that the rejection come as soon as possible so he can move in Nez Perce County Case Number CV08-01226 to add an additional cause of action to the complaint as soon as possible.

The reason for this demand is the history of oppression perpetrated against Ronald McCann by those in control of the corporation which includes management of the corporation in a manner designed to preclude any real benefit to Ronald McCann and its other shareholders on account of their status as shareholders. This has caused and will continue to cause repetitive lawsuits. It is in the best interest of all shareholders and the Corporation to avoid lawsuits. A summary of the factual history of oppression is as detailed in the amended complaint filed in Nez Perce County District Court Case Number CV-08-01226, Ronald R. McCann v. William V. McCann, Jr., and Gary E. Meisner, and McCann Ranch & Livestock Company, Inc. Said conduct violates the fiduciary duties owed to the undersigned by those in control of the corporation.

DATED: This 10 day of June, 2009.


Ronald R. McCann

Subscribed and sworn to before me on the 10th day of June, 2009.



McDevitt & Miller LLP
Lawyers

(208) 343-7500
(208) 336-6912 (Fax)

420 W. Bannock Street
P.O. Box 2564-83701
Boise, Idaho 83702

Chas. F. McDevitt
Dean J. (Joe) Miller

September 8, 2009

Via Federal Express & Electronic Mail

Timothy Esser, Esq.
Esser & Sandberg, PLLC
520 E. Main Street
Pullman, WA 99163

Re: McCann v. McCann

Dear Mr. Esser:

Transmitted herewith are the following:

- Minutes;
- Waiver of Notice;
- Mr. Ronald R. McCann's demand letter;
- Opinion Letter.

The Board has rejected Mr. Ronald R. McCann's demand of June 10, 2009.

Very truly yours,

McDEVITT & MILLER LLP


Chas F. McDevitt

CFM/hh
Cc: Andrew Schwam, Esq.

**MINUTES OF THE SPECIAL MEETING OF THE BOARD
OF DIRECTORS OF McCANN RANCH & LIVESTOCK CO.**

A special meeting of the Board of Directors of McCann Ranch & Livestock Co., was held via telephone conference call on the 28th day of August, 2009, at the hour of 6 a.m. Pacific time, pursuant to the bylaws of the corporation.

The following were present via telephone conference call: William Vern McCann, Jr., Gary E. Meisner, Lori Ann McCann, and James A. Schoff, being all of the directors of the corporation, constituting a quorum. In addition to the directors, Corporate Attorney, Charles F. McDevitt was also present at the meeting via telephone.

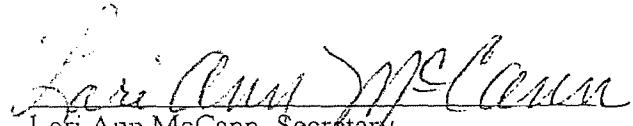
The President discussed the waiver of notice of special meeting, subscribed by the directors of the corporation and it was ordered that it be appended to the minutes of the meeting.

President McCann reviewed Shareholder Ronald R. McCann's Demand to the Board of Directors, dated June 10, 2009. A copy of said demand is attached to these minutes as Exhibit "B". A discussion ensued concerning such demand. Also discussed was the legal opinion letter provided by Corporate Counsel, Charles McDevitt. A copy of such opinion letter is attached hereto and marked Exhibit "C". The Board continued its discussion and the board members had opportunity to ask Corporate Counsel questions about his opinion. It is the opinion of Corporate Counsel that the demand made by Shareholder Ronald R. McCann is an improper demand for a derivative action as the demand gives him no right to file any derivative action against the corporation.

A motion was then made by Gary E. Meisner, and seconded by James A. Schoff, to reject Shareholder Ronald R. McCann's Demand to the Board of Directors. Upon the vote of the board, the motion unanimously passed.

President McCann asked Mr. McDevitt to brief the board about the status of the litigation filed by Ronald McCann. A discussion ensued about the lawsuit and questions were posed to both President McCann and to Counsel McDevitt.

There being no further business to come before the board, the meeting was adjourned.


Lori Ann McCann, Secretary

WAIVER OF NOTICE OF SPECIAL MEETING OF DIRECTORS
OF
McCANN RANCH & LIVESTOCK CO.

We, the undersigned, a majority of the duly elected directors of McCANN RANCH & LIVESTOCK CO., do hereby severally waive notice of time, place and purpose of the meeting of directors of said corporation and consent that the meeting be held via telephone conference on the 28th day of August, 2009, at the hour of 6 a.m., Pacific Time.

The purpose of such meeting is to discuss Shareholder Ronald McCann's Demand to the Board of Directors, dated the 10th day of June, 2009. Further, we consent to the transaction of any and all business which may properly come before the meeting.

DATED this 28th day of August, 2009.

/s/
William Vern McCann, Jr., Director

/s/
Lori Ann McCann, Director

/s/
Gary E. Meisner, Director

/s/
James A. Schoff, Director

EXHIBIT "A"

Shareholder Ronald McCann's Demand to the Board of Directors, Majority Shareholders and the Corporation, McCann Ranch & Livestock Company, Inc.

- To: McCann Ranch & Livestock Company, Inc., c/o of William McCann, its Registered Agent
- To: William McCann, Jr. as President, Member of the Board of Directors, and Majority Shareholder in McCann Ranch & Livestock Company, Inc.
- To: Gary Meisner as an Officer, Member of the Board of Directors, and Majority Shareholder (re Trustee) in McCann Ranch & Livestock Company, Inc.
- To: Lori Ann McCann as an Officer and Member of the Board of Directors of McCann Ranch & Livestock Company, Inc.
- To: James A. Schoff as an Officer and Member of the Board of Directors of McCann Ranch & Livestock Company, Inc.
- To: All other Officers and Members of the Board of Directors of McCann Ranch & Livestock Company, Inc.

James A. Schoff
Pursuant to Idaho Code Section 30-1-342(1) and the Idaho Rules of Civil Procedure, Ronald R. McCann, a shareholder in McCann Ranch & Livestock Company, Inc. makes demand as follows:

1. That McCann Ranch & Livestock Company, Inc., and its Board of Directors agree in writing to enter into a reorganization which accomplishes a spin-off of 36.68% (as determined by current fair market value) of its assets to Ronald McCann, Inc., or other named corporation as selected by Ronald McCann, Inc. with the spin-off to include the following steps and terms:
 - a) 36.68% of the assets shall be determined by the use of current market value for each asset and then transferring assets equal to 36.68% of the total.
 - b) Ronald McCann will transfer his shares to McCann Ranch & Livestock, Inc., or to Ronald McCann, Inc. who will then transfer to

McCann Ranch & Livestock, Inc. -- the method producing the lowest immediate tax consequence will be used.

- c) If Ronald McCann and the other required parties do not, within 90-days of service of this notice, agree on all matters necessary to accomplish the spin-off and in fact accomplish the spin-off, then the matter will be submitted to Senior District Judge George Carey in Nez Perce County Civil Case Number CV-08-01226 for determination of all unresolved matters and issuance of all orders necessary to accomplish the spin-off.

If the Corporation and/or its two controlling shareholders are going to reject the foregoing demand, Ronald McCann asks that the rejection come as soon as possible so he can move in Nez Perce County Case Number CV08-01226 to add an additional cause of action to the complaint as soon as possible.

The reason for this demand is the history of oppression perpetrated against Ronald McCann by those in control of the corporation which includes management of the corporation in a manner designed to preclude any real benefit to Ronald McCann and its other shareholders on account of their status as shareholders. This has caused and will continue to cause repetitive lawsuits. It is in the best interest of all shareholders and the Corporation to avoid lawsuits. A summary of the factual history of oppression is as detailed in the amended complaint filed in Nez Perce County District Court Case Number CV-08-01226, Ronald R. McCann v. William V. McCann, Jr., and Gary E. Meisner, and McCann Ranch & Livestock Company, Inc. Said conduct violates the fiduciary duties owed to the undersigned by those in control of the corporation.

DATED: This 10 day of June, 2009.


Ronald R. McCann

Subscribed and sworn to before me on the 10th day of June, 2009.

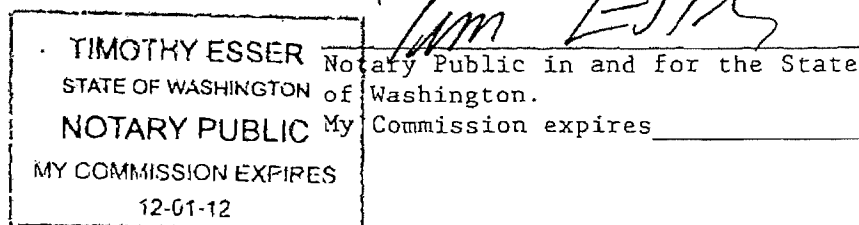


EXHIBIT "B"

McDevitt & Miller LLP
Lawyers

(208) 343-7500
(208) 346-6912 (Fax)

420 W. Bannock Street
P.O. Box 2564-83701
Boise, Idaho 83702

Chas. E. McDevitt
Dean J. (Joe) Miller

August 19, 2009

Via Facsimile Transmission

Mr. William McCann, Jr.
President
McCANN RANCH & LIVESTOCK CO.
P.O. Box 445
Lewiston, Idaho 83501

Dear Bill:

You have provided me with a copy of a "Demand" by Ron McCann and asked for my opinion concerning the same.

Facts: On or about June 10, 2009, Ronald R. McCann [hereafter "McCann"], a shareholder in McCann Ranch & Livestock Company, Inc. [hereafter "McCann Ranch"] made a written demand "Pursuant to Idaho Code Section 30-1-742(1) Counsel for Ronald admits that this is a typographical error intended to reference §30-1-742(1)] that McCann Ranch voluntarily "enter into a reorganization" by transferring 36.68% of its assets to Ronald McCann in return for his stock in the corporation. The intended authority for this demand, §30-1-742(1), provides in pertinent part that a shareholder may not commence a derivative suit until a shareholder makes a written demand that the corporation take suitable action and the corporation then rejects the demand or does not comply with it within 90 days.

Conclusion: McCann's demand gives him no right to file any derivative action.

Analysis: A "derivative suit" is a "civil suit in the right of a...corporation, §30-1-740. It is a civil action brought by a shareholder "on behalf of a corporation." [ABA Official Comment to §30-1-740]. Its purpose is "in enforcing the right of the corporation" [§30-1-741(2)] for injury to/sustained by the corporation. Jordan v. Hunter, 124 Idaho 899, 865 P.2d 990 (1993). A derivative suit is intended to assert a cause of action based on conduct injurious to a corporation. Knutsen v. Brushour, 92 Idaho 37, 436 P.2d 521 (1968).

If a corporation refuses to sue for such injury to itself then, upon making a demand that the corporation file such a suit, and upon that demand being refused by the corporation [or the passage of 90 days], a shareholder may then bring a derivative suit, *i.e.*, a suit on behalf of the corporation to remedy the injury to the corporation. *Id.* §30-1-742(1) codifies that shareholder remedy, providing that a shareholder may commence such a "derivative proceeding," *i.e.*, such a lawsuit for injury to the corporation, if the corporation, upon written demand, rejects the demand or fails to take "suitable action" within 90 days.

Herein, however, §30-1-742(1) is entirely inapplicable, *i.e.*, it gives no right to McCann to file any derivative action, for two separate reasons.

(a) Firstly, there is no claimed "injury to the corporation" for which the corporation itself could file suit and hence there is no suit re which a shareholder could derivatively file upon the corporation refusing to do so. McCann may or may not feel wronged if the corporation refuses to purchase his stock, but that is no injury to the corporation. Any logical reading of the demand reveals that it is intended for the benefit of McCann only – he wishes to be bought out of the corporation, at which time he will have no further

interest in it. If that demand is rejected, there is no suit "on behalf of the corporation" which could be brought. McCann has no right to bring a derivative action because, among other reasons, there is no injury to the corporation, no right for it to assert. There is thus nothing for McCann to derivatively assert.

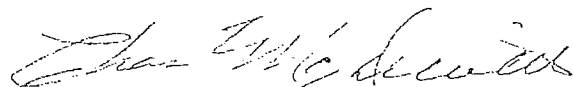
(b) Second, McCann's demand does not comply with §30-1-742(1) in any event because it does not request "suitable action." The action demanded by the shareholder is not that the corporation prosecute some civil lawsuit for injury to itself (and therefore that the shareholder be entitled to derivatively do so should the corporation refuse to sue), but rather that the corporation voluntarily reacquire McCann's stock by transferring to him 36.68% of the corporation's assets. This is neither a demand that the corporation sue to remedy an injury to itself (and so there is no cause of action for the shareholder to derivatively pursue) nor is it a demand for "suitable action" (because both the transfer of corporate assets and the corporation's reacquisition of its own stock are matters for the sole discretion of the board of directors, not the unilateral demand of a shareholder).

A corporation *may* acquire its own shares (§30-1-631), but no Code provision *requires* such reacquisition. Instead, as with all matters of corporate governance, a disposition of corporate assets as is demanded by McCann is a matter of board discretion (§30-1-1202) as is stock reacquisition, all to be exercised *by the board* "in the best interests of the corporation." §30-1-830(1); Jenkins v. Jenkins, 138 Idaho 424, 64 P.3d 953 (2003); Steeleman v. Mallory, 110 Idaho 510, 716 P.2d 1282 (1986). Demanding, under the purported authority of §30-1-742(1) or otherwise, that the corporation buy his stock is no more a demand for "suitable action" under that Code section than a shareholder demand that the board appoint his niece as the corporate secretary. Both are matters for board action and discretion, not shareholder "demand." Both are matters to be determined by the Board in the best interests of the corporation." But it is not for a shareholder to unilaterally determine what is the "best interest of the corporation."

I recommend you hold a meeting of the Board of Directors before September 9, 2009, to address this "Demand".

Very truly yours,

McDEVITT & MILLER LLP


Chas F. McDevitt

CFM/hh

EXHIBIT "C"

PLAINTIFF'S MOTION TO AMEND AMENDED COMPLAINT

713

FILED

2009 SEP 18 AM 9 04

Timothy Esser #6770
Esser & Sandberg, PLLC
520 East Main Street
Pullman, Washington 99163
Phone: (509) 332-7692
Fax: (509) 334-2205

PATY GEEKS
CLERK OF THE DISTRICT COURT
Patty Geeks
DEPUTY

Andrew Schwam #1573
Schwam Law Firm
514 South Polk #6
Moscow, ID 83843
Phone: (208) 882-4190

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)
)
Plaintiff,)

No. CV08-01226

v.)

AFFIDAVIT OF TIMOTHY ESSER
IN SUPPORT OF PLAINTIFF'S
MOTION TO AMEND AMENDED
COMPLAINT

WILLIAM V. McCANN, JR., and)
GARY E. MEISNER, individually)
as a director of McCann Ranch)
Livestock Company, Inc., and as a)
shareholder of McCann Ranch &)
Livestock, Inc., in his capacity as)
Trustee of the William V. McCann,)
Sr. Stock Trust,)

Defendants,)

McCANN RANCH &)
LIVESTOCK COMPANY, INC.,)

Nominal Defendant.)

WASHINGTON STATE)

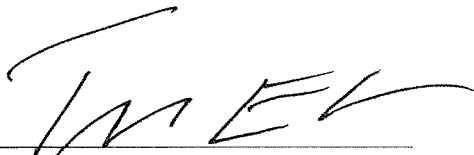
COUNTY OF WHITMAN) ss

Timothy Esser on oath, says:
AFFIDAVIT OF TIMOTHY ESSER IN SUPPORT OF PLAINTIFF'S
MOTION TO AMEND AMENDED COMPLAINT -- 1

Plaintiff moves to amend the Amended Complaint on file herein. No trial date has been set. Discovery is far from being completed. Defendants will not be prejudiced in any way. Rule 15 provides that relief shall be freely given when justice so requires.

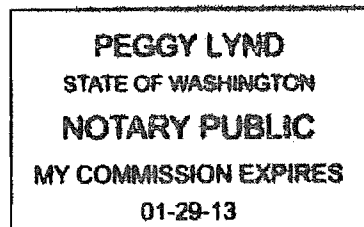
This action was originally filed June 10, 2008. However, due to the difficulty in obtaining a judge, and the Defendants' motion to dismiss, no discovery or progress was made in the case until Judge Carey was assigned and the Defendants' initial motion to dismiss, and Plaintiff's motion to compel discovery were decided – by the Court's orders entered March 4, 2009. Given the Court's determination that Plaintiff's first cause of action should have been characterized as a derivative action and the derivative action procedure followed, Plaintiff made his demand and has been waiting for the Defendants to reject said demand in order for the necessary 90 days to elapse – both of which have just now occurred. In short, Plaintiff has proceeded diligently.

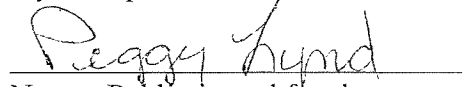
DATED: This 17th day of September 2009.



Timothy Esser

Subscribed and sworn to before me this 17th day of September 2009.





Notary Public in and for the
State of Washington.
Commission expires: 1-29-13

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

PLAINTIFF,

V.

WILLIAM V. McCANN, JR., AND
GARY E. MEISNER, INDIVIDUALLY
AND AS DIRECTOR OF McCANN
RANCH & LIVESTOCK COMPANY,
INC., AND AS A SHAREHOLDER OF
McCANN RANCH & LIVESTOCK
COMPANY, INC., IN HIS CAPACITY
AS TRUSTEE OF THE WILLIAM V.
McCANN SR. TRUST,

DEFENDANTS,

McCANN RANCH & LIVESTOCK
COMPANY, INC.,

NOMINAL DEFENDANT.

CASE NO. CV 08-01226C
MEMORANDUM AND ORDER
ON MOTION TO AMEND
PREVIOUSLY AMENDED
COMPLAINT

*filed in chambers
Nov. 12, 2009 8^{am}.
Bry McCann,
Senior District Judge*

This is an on-going dispute between Plaintiff Ronald McCann and his brother William McCann, Jr., concerning the operation of McCann Ranch & Livestock Company, Inc., a closely-held corporation created by their father many years ago. An earlier case involving this dispute was decided against the plaintiff by The Idaho Supreme Court in *McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002).

In the current case the defendants moved to dismiss both counts of the amended complaint. The court treated the defendants' motion to dismiss the first count of the plaintiff's amended complaint as a motion for summary judgment. The

court concluded that the first count was derivative in nature and that the plaintiff had failed to comply with the statutory demand and rejection requirement, a condition precedent to filing a derivative action. The motion, therefore, was granted. The court denied the motion to dismiss the second count, holding that it stated a claim and was not derivative in nature. Each side moved for reconsideration. The motions to reconsider were denied. The plaintiff now has moved to amend his previously-amended complaint.

In his proposed amendment, the plaintiff seeks to re-assert the allegations in his first derivative claim and further alleges that he now has complied with the demand and rejection requirement for filing a derivative action.

The record shows that this case was commenced by the filing of the original complaint on June 10, 2008. The plaintiff asserts that his demand was served on the corporate board one year later, sometime between June 11 and June 15, 2009. It was rejected in September 2009.

The court is granted broad discretion in considering a motion to amend the pleadings and should permit amendments freely when justice so requires. IRCP Rule 15(a). The court may consider whether the new claim proposed to be inserted into the action by the amended complaint states valid a claim for which relief may be granted. The court also may consider whether the opposing party will be prejudiced by any delay in adding a new claim or whether the opposing party has an available defense (for example, statute of limitations) to the proposed amendment. See, *Black Canyon Racquetball Club v. Idaho First National Bank*, 119 Idaho 171, 804 P.2d 900 (1991).

The Idaho Supreme Court recently held that a post-summary judgment demand on a board of directors in an alleged derivative action is "inconsequential

because Idaho Code Section 30-1-742 requires the demand to be made ninety days before the commencement of the derivative action." *Mannos v. Moss*, 143 Idaho 927, 934, 155 P.3d 1166 (2007). The plaintiff's attempt to revive his derivative action by belatedly making a demand on the board is nothing more than a somewhat revised version of his tactic, attempted in the first *McCann* case, of bringing a derivative action without bothering to comply with Idaho Code Section 30-1-742.

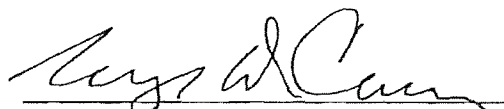
Based on the holding in *Mannos* and based on the plaintiff's repeated failure to attempt compliance with Idaho Code Section 30-1-742 until after he has received an unfavorable ruling, the motion to amend will be denied.

In one of his memoranda the plaintiff has asked the court a second time to reconsider its original summary judgment decision. The decision whether to grant or deny a motion for reconsideration generally rests in the sound discretion of the trial court. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006). The court is not inclined to re-hash what it has ruled on twice. To the extent that the motion is in the nature of a renewed motion for reconsideration, it will be denied.

ORDER

It hereby is ordered that the plaintiff's motion to amend his amended complaint is denied.

DATED November 12, 2009.


George D. Carey, Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM AND ORDER ON MOTION TO AMEND PREVIOUSLY AMENDED COMPLAINT was:

✓ FAXED by the undersigned at Lewiston, Idaho, this 13 day of November 2009, to:

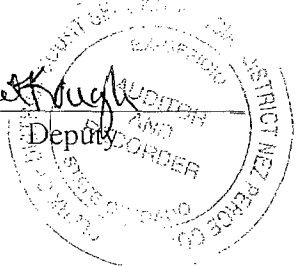
Michael McNichols 208-746-0753
Merlyn Clark 208-954-5278
Chas. McDevitt 208-336-6912
Timothy Esser 509-334-2205

✓ MAILED by the undersigned at Lewiston, Idaho, this 13 day of November 2009, to:

Andrew Schwam
514 S Polk St #6
Moscow, ID 83843

PATTY O. WEEKS, CLERK

By: *Deborah*



MEMORANDUM AND ORDER ON
MOTION TO AMEND PREVIOUSLY
AMENDED COMPLAINT

FILED

2010 JAN 15 AM 10 40

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

Chas. F. McDevitt (ISB No. 835)
Dean J. Miller (ISB No. 1968)
MCDEVITT & MILLER LLP
420 West Bannock Street
P.O. Box 2565-83701
Boise, ID 83702
Tel: 208-343-7500
Fax: 208-336-6912

Attorneys for Nominal Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and
GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK
COMPANY, INC.,

Nominal Defendant.

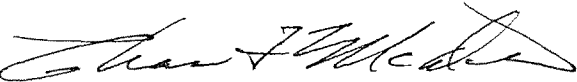
Case No. CV 08-01226

MCCANN RANCH & LIVESTOCK
COMPANY, INC.'S MOTION FOR
SUMMARY JUDGMENT

The McCann Ranch & Livestock Company, Inc. (the "Corporation"), by and through its counsel of record, and pursuant to I.R.C.P. 56, hereby moves for summary judgment on Plaintiff's cause of action for judicial dissolution of the Corporation pursuant to Idaho Code § 30-1-1430, which is the only remaining cause of action in Plaintiff's Amended Complaint. This Motion for Summary Judgment is supported by a supporting memorandum, the Affidavit of William V. McCann, Jr., the Affidavit of Dorothy Snowball, the Affidavit of James A. Schoff and the Affidavit of Gary Meisner, all filed concurrently herewith.

DATED THIS 14th day of January, 2010.

MCDEVITT & MILLER LLP

By 
Charles F. McDevitt , ISB No. 835
Attorneys for Nominal Defendant McCann
Ranch & Livestock Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January, 2010, I caused to be served a true copy of the foregoing MCCANN RANCH & LIVESTOCK COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Timothy Esser
ESSER & SANDBERG, PLLC
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy: 509.334.2205

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk, #6
Moscow, ID 83843
[Attorneys for Plaintiff]

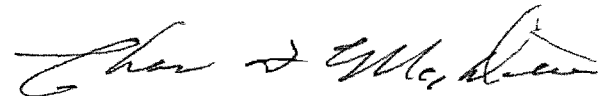
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☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy

Michael E. McNichols
CLEMENTS BROWN
321 13th Street
P.O. Box 1510
Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

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Merlyn W. Clark, ISB No. 1026
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Defendant William V. McCann, Jr.]

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☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy: 208.336.6912



Chas. F. McDevitt

ORIGINAL

FILED

2010 JAN 15 AM 10 40

Michael E. McNichols
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Attorneys at Law
321 13th Street
Post Office Box 1510
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(208) 743-6538
(208) 746-0753 (Facsimile)
ISB No. 993

PATTY O. WEEKS
CLERK OF THE DIST. COURT

[Signature]
DEPUTY

Attorneys for Defendant Gary Meisner

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,)
)
Plaintiff,)
)
vs.)
)
WILLIAM V. McCANN, JR., and)
GARY E. MEISNER,)
)
Defendants,)
)
McCANN RANCH & LIVESTOCK)
COMPANY, INC.,)
)
Nominal Defendant.)

Case No: CV 08-1226

AFFIDAVIT OF
GARY MEISNER

STATE OF IDAHO)
) ss.
County of Ada)

Gary Meisner, being first duly sworn on oath, states:

1. I am an adult citizen of the United States of America, competent to testify as a witness, and make this affidavit on my personal knowledge.

2. I reside in Boise, Idaho. I am 70 years old. For most of my professional life I was an appraiser with Western Appraisals in Lewiston, Idaho. I semi-retired as an appraiser in 1997 or 1998 and remained in Lewiston until approximately 3 years ago when my wife and I moved to Boise to be near my son who resides here with his family.

3. William V. McCann, Sr., named me as the trustee of his testamentary trust. I have served as the trustee of that trust since the death of William V. McCann, Sr. I have not charged nor received any compensation in any form for my service, but have acted as trustee out of friendship for William V. McCann, Sr., and his family.

4. I have been a member of the Board of Directors ("the Board") of McCann Ranch & Livestock Company ("the corporation") since December, 1998. I am not now and never have been an employee of the corporation. I am not related in any way to William V. McCann, Jr., or Lori McCann and have never been employed by them though William V. McCann, Jr., has periodically performed legal services for me. I do not receive a salary any compensation for acting as a Director other than a payment of

\$200.00 for each meeting of the Board and reimbursement of actual expenses incurred. I have served as a Director of the corporation out of friendship for the McCann Family.

5. The Board of the corporation is made up of William V. McCann, Jr., Lori A. McCann, James A. Schoff and myself.

6. The Board has two committees, a Compensation Committee and a Dividend Committee, both of which are made up of James A. Schoff and myself.

7. The Dividend Committee and the Compensation Committee meet annually, usually by telephone, to discuss making recommendations to the Board of Directors concerning dividends and the salary of the president, William V. McCann, Jr. Mr. McCann does not attend the committee meetings.

8. Prior to 2004, the corporation had never paid a dividend. Since then, the corporation has paid the following dividends, all based upon the recommendation of the Dividend Committee:

<u>Year</u>	<u>Dividend Per Share</u>	<u>Total Dividends Paid</u>
2004	\$.04 per share	\$10,000.00
2007	\$.10 per share	\$25,000.00
2008	\$.14 per share	\$35,000.00

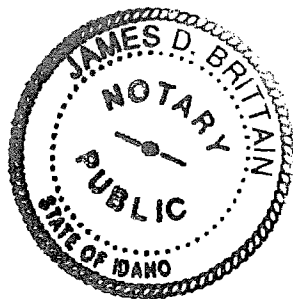
9. The salary of the corporation's president is determined by the Board based upon recommendations from the Compensation Committee. William V. McCann, Jr., serves as the president and CEO of the corporation. There is a written job description of the president, but I am sure that his duties and responsibilities far exceed those in the written job description. The president's salary was set at the rate of \$144,000.00 per year

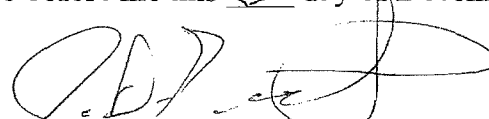
from May 1, 1999, through 2006. In December of 2006 the Compensation Committee recommended that the president's salary be increased to \$160,000.00 per year, effective January 1, 2007, and that his salary be reviewed annually. The Compensation Committee has not recommended any increases in salary since December 2006. The president does not receive any health insurance benefits, retirement plan benefits and has never been paid a bonus. It is my opinion that William V. McCann, Jr.'s salary of \$160,000.00 a year is lower than it should be and I hope that the Compensation Committee can recommend an increase in the near future.

DATED this 23 day of December, 2009.


Gary Meisner

SUBSCRIBED AND SWORN to before me this 23 day of December, 2009




Notary Public in and for the State of Idaho,
Residing at Bovise, Idaho, therein.
My Commission Expires: 03/31/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Timothy Esser
LIBEY ENSLEY ESSER & NELSON
520 E. Main Street
Pullman, WA 99163

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-Mail

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk #6
Moscow, ID 83843

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-Mail

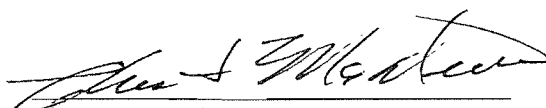
Michael E. McNichols
CLEMENTS BROWN
321 13th Street
P.O. Box 1510
Lewiston, ID 83501-1510

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-Mail

Merlyn Clark
HAWLEY TROXELL ENNIS
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-Mail

MCDEVITT & MILLER LLP


Chas F. McDevitt

FILED

PATTY O. WEEKS
CLERK OF THE DIST. COURT

Chas. F. McDevitt (ISB No. 835)
Dean J. Miller (ISB No. 1968)
MCDEVITT & MILLER LLP
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Tel: 208-343-7500
Fax: 208-336-6912

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

MEMORANDUM IN SUPPORT OF
MCCANN RANCH'S MOTION FOR
SUMMARY JUDGMENT

728

I. INTRODUCTION

Defendant McCann Ranch & Livestock Co. (the “Corporation”) seeks a summary judgment to dismiss Count 2, the only remaining count, in Plaintiff’s Amended Complaint. Count 2 alleges that the Corporation should be judicially dissolved under I.C. § 31-1-1430. Section 31-1-1430 provides that a district court may dissolve a corporation in a proceeding by a shareholder if it is established that the directors or those in control of the corporation have acted or are acting in a manner that is illegal, oppressive or fraudulent, and irreparable injury to the corporation is threatened or being suffered by reason thereof.

Summary Judgment is appropriate because Plaintiff cannot show “irreparable injury or threat of irreparable injury to the corporation,” which is an essential element to a corporate dissolution cause of action. Defendant is not seeking summary judgment on the element of “illegal, oppressive or fraudulent” actions because, while denied, this element arguably may present issues of fact.

The Court has already recognized the extremely high burden Plaintiff must satisfy to obtain the relief Plaintiff requests:

[The court] is well aware, however that the proved circumstances will have to be quite significant before any of the equitable relief sought by Ronald R. McCann may be granted. It also is aware that the plaintiff will have to prove irreparable rather [than] reparable injury to the corporation.

Memorandum and Order filed March 4, 2009, p. 11. Plaintiff is unable to raise a material issue of fact as to the essential element of “irreparable injury or threat of irreparable injury to the corporation.” Accordingly, summary judgment is appropriate.

II. PROCEDURAL BACKGROUND

The present dispute between Plaintiff Ronald R. McCann and the Defendants began over nine years ago and is now in its second round through the courts. Plaintiff is a shareholder of the

Corporation. On June 19, 2000, Plaintiff filed an action in Nez Perce County District Court, Case No. CV-00-01111 (*McCann I*), naming as defendants two shareholders of the Corporation, William V. McCann, Jr. and Gary E. Meisner (the "Director Defendants"). Plaintiff's 2000 lawsuit alleged a variety of causes of action against the Director Defendants, including breach of fiduciary duties, negligence, conversion, self-dealing and conflict of interest transactions. *See* Complaint filed in *McCann I* (the "*McCann I* Complaint"), ¶¶ 4.1 - 8.7, attached as Exhibit 1 to Defendants' Memorandum in Support of Motion to Dismiss previously filed in the current action. An Amended Complaint filed by Plaintiff asserted the same causes of action as the original Complaint and included a variety of allegations against William V. McCann, Jr. and Gary E. Meisner, including: (1) that the Board was wrongfully paying Gertrude McCann (the mother of Ronald R. McCann and William McCann, Jr.) an annual consultation fee; (2) that William V. McCann, Jr.'s \$144,000 salary was excessive; and (3) that Ronald R. McCann had been removed as a director of the Corporation. *See McCann I* Amended Complaint; *see also McCann I* District Court Opinion, pp. 2-5 (attached as Exhibits 2 and 4 to Defendants' Memorandum in Support of Motion to Dismiss previously filed in the current action).

The District Court dismissed the *McCann I* Complaint for failure to comply with the written demand requirement set forth in I.C. § 30-1-742. On November 1, 2000, Plaintiff filed a Supplemental Memorandum In Support Of Plaintiff's Motion to Amend Complaint, which attached a proposed Amended Complaint (the Supplemental Memorandum and proposed Amended Complaint are attached as Exhibit 3 to Defendant's Memorandum in Support of Motion to Dismiss previously filed in the current action). Plaintiff's proposed Amended Complaint prayed for judicial dissolution pursuant to Idaho Code § 30-1-1430 due to alleged shareholder oppression:

5. That pursuant to Idaho Code § 30-1-1430(2)(b), McCann Ranch & Livestock Co. be ordered judicially dissolved based upon the oppressive conduct of the controlling shareholder/directors toward the minority shareholder which has caused and is causing irreparable damage to the Corporation.

The District Court ultimately dismissed the *McCann I* Complaint with prejudice and held that Plaintiff would not be allowed to file any amended complaint. *See* January 5, 2001 Opinion and Order, p. 8. The Opinion and Order was affirmed by the Idaho Supreme Court. *See McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002) ("*McCann I*").

Six years later, on June 10, 2008, Plaintiff again brought suit against the Corporation, as well as William V. McCann, Jr. and Gary E. Meisner as directors of the Corporation ("*McCann II*"). An Amended Complaint was filed on or about October 14, 2008. The *McCann II* Amended Complaint asserted the two same causes of action brought in the *McCann I* complaint and proposed amended complaint: (1) a breach of fiduciary duty cause of action against William V. McCann, Jr. and Gary E. Meisner as directors of the Corporation; and (2) an action for judicial dissolution of the Corporation pursuant to I.C. § 30-1-1430.

In a March 4, 2009 Order, this Court dismissed Plaintiff's first cause of action for failure to comply with the written demand requirement set forth in I.C. § 30-1-742. Plaintiff's motion to reconsider was denied in the Court's Memorandum and Order on Various Motions dated May 15, 2009. Plaintiffs then moved to file a second amended complaint to assert a derivative cause of action, which was denied by the Court in its Memorandum and Order on Motion to Amend Previously Amended Complaint dated November 12, 2009. The only claim now remaining is Plaintiff's cause of action for judicial dissolution of the Corporation pursuant to I.C. § 30-1-1430. In recognition that this is the second in a series of lawsuits containing virtually identical factual allegations, the Court has indicated that it will consider only facts subsequent to January

5, 2001, the date on which the District Court dismissed *McCann I*. See March 4, 2009 Order, p. 7 (“In addressing the new claims on the merits, the court anticipates that it will be considering events that took place after January 5, 2001.”).¹

IV. FACTUAL BACKGROUND

A. Background of the McCann Ranch and Livestock Company, Inc.

The McCann Ranch and Livestock Co. (the “Corporation”) is an Idaho corporation with assets in and around Lewiston, Idaho. The Corporation owns extensive commercial real estate properties consisting of leased, commercial and industrial lands, four ranches, which include timber and pasture lands, residential properties and livestock. See Affidavit of William V. McCann, Jr., filed concurrently herewith, ¶¶ 3-5; Amended Complaint, ¶¶ 11-12.

William V. McCann, Sr. (“Bill, Sr.”), formed the Corporation in 1974, and Bill, Sr. and his wife, Gertrude McCann, transferred to the Corporation ranch and timber lands and several acres of undeveloped commercial land that is located in and around Lewiston, Idaho. Amended Complaint, ¶ 5; William V. McCann, Jr., Aff., ¶ 11. Over the next several years, Bill, Sr. gifted each of his sons, Plaintiff Ronald R. McCann and William V. McCann, Jr., 36.7% of the shares of the Corporation. *Id.* Following Bill, Sr.’s death in 1997, his will bequeathed the remaining shares of the Corporation in trust to Defendant Gary Meisner, for the benefit of Gertrude McCann during her life and then the Trust is to distribute the shares to William V. McCann, Jr. upon her death, if he survives her. See William V. McCann, Jr. Aff., ¶ 4. This ownership interest has remained the same since Bill Sr.’s death. *Id.*

¹ In a related March 5, 2009 Order addressing discovery disputes, this Court held that Defendants’ responses to Plaintiff’s discovery requests could be limited to events and (continued . . .)

At all times relevant to this action, the Corporation has been managed by a Board of Directors. The current Board of Directors consists of James A. Schoff, Gary E. Meisner, Lori A. McCann and William V. McCann, Jr. See Affidavit of William V. McCann, Jr., ¶ 6. The Corporation also has a Compensation Committee, which consists of independent directors, James A. Schoff and Gary E. Meisner, and a Dividend Committee, which also consists of James A. Schoff and Gary E. Meisner. *Id.*

B. The Corporation's History of Profitability, Even in the Current Economy

Plaintiff contends that the Corporation is suffering or is threatened with irreparable injury as a result of the actions of the Defendants. This assertion flies in the face of the fact that the Corporation has been profitable each of the last seven years. The following table sets forth the annual net income of the Corporation from 2002 through 2008:

2008	\$138,139.62
2007	\$ 75,865.77
2006	\$309,067.25
2005	\$106,309.54
2004	\$ 23,180.69
2003	\$129,160.13
2002	\$ 69,764.60
TOTAL	\$851,487.60

See Affidavit of Dorothy Snowball, filed concurrently herewith, Exhs. B - H. Notably, the Corporation has even remained profitable in the current economic downturn. *Id.* at ¶ 10.

C. The Corporation's Cash Flow

While the Corporation is profitable and financially sound, the Corporation is experiencing reduced cash flow. The reduction in cash flow is partly the result of the cost of this

(... continued)

transactions occurring after January 5, 2001. See also, Order August 31, 2009.

litigation, which exceeds \$250,000.00, the loss of income from one of the larger commercial properties owned by the Corporation that is known as Tidymans, and the need to service debt of the Corporation, including a loan that the Corporation refinanced in 2004 in the amount of \$6,100,000 that is payable over a 12-year period. The Corporation borrowed \$6,100,000 from Protective Life Insurance Company. The monthly payments are \$58,741. Since the loan payments started on September 1, 2004, more than \$3,348,218 has been paid on the loan balance. The balance as of December 1, 2009 is \$3,935,646, which will be fully amortized over a period of 6 ½ years. Refinancing the long-term debt was a prudent business decisions because the rates of interest on the pre-existing debt ranged from 7.50% to 8.25% and the rate of interest on the Protective Life loan is fixed at 5.75%. The reduction in the debt of the Corporation will continue to increase the equity of the shareholders so long as revenues and expenses of the Corporation remain relatively constant. The fact that the Corporation has made timely payments of approximately \$705,000 a year for the past five years on the debt to the insurance company shows that the Corporation is financially strong. *See* Snowball Aff., ¶¶ 11-12.

D. The Corporation's History of Paying Dividends

The Corporation never issued dividends during the entire 23 years that Bill, Sr. managed the Corporation. *See* Snowball Aff., ¶ 14. The Corporation first paid a dividend in 2004. Since that time, when cash flow permitted, the Corporation has paid dividends as follows:

12/28/2004 (\$.04 per share) (Ron's share \$ 3,668) Total dividend paid \$10,000

1/17/2007 (\$.10 per share) (Ron's share \$ 9,170) Total dividend paid \$25,000

3/31/2008 (\$.14 per share) (Ron's share \$ 12,838) Total dividend paid \$35,000

TOTAL DIVIDENDS PAID \$70,000.

Id. The decision of the Board of Directors whether to pay a dividend is based on the recommendation of a dividend committee, which consists of the independent directors, James A. Schoff and Gary E. Meisner. *See* Affidavit of James A. Schoff, filed concurrently herewith, ¶ 10; Affidavit of Gary Meisner Aff., ¶ 7.

E. William V. McCann, Jr.'s Salary

William V. McCann, Jr. serves as the President and CEO of the Corporation. In that position, he is responsible for the management and operations of the Corporation. *See* Schoff Aff., ¶ 13, Exh. 3; *see also* Affidavit of William V. McCann, Jr., ¶ 7. Plaintiff unsuccessfully challenged William V. McCann, Jr.'s salary in *McCann I*, and very little has changed since that time, yet Plaintiff now challenges that salary again in *McCann II*. At the time of *McCann I*, William V. McCann, Jr. was paid an annual salary of \$144,000. He had been paid that same salary since May 1, 1999. *Id.*

The salary of William V. McCann, Jr. is determined by the Board of Directors of the Corporation, based upon the recommendation of the Compensation Committee, of which William V. McCann, Jr. is not a member. Instead, the Compensation Committee consists of the independent directors, Gary E. Meisner and James A. Schoff, neither of which receives a salary or other compensation from the Corporation, other than a nominal stipend for attending Board meetings and reimbursement of expenses. In December of 2006, the Compensation Committee reviewed the salary of William V. McCann, Jr., as President and CEO of the Corporation. The Compensation Committee noted that William V. McCann, Jr. had been earning the same salary of \$144,000 since 1999, and the Compensation Committee further considered a variety of factors, including the varied responsibilities of the President of the Corporation, to determine what salary the President should be paid. The Compensation Committee recommended that the

Corporation increase William V. McCann, Jr.'s salary to \$160,000 per year and that the salary be reviewed annually. The Compensation Committee re-evaluated the salary in 2007 and in 2008, each time recommending that the salary stay the same. *See* Schoff Aff., ¶¶ 13-14; Meisner Aff., ¶ 9.

In addition to the salary, William V. McCann, Jr. is provided the use of a Corporation vehicle and a mobile phone. He receives no other compensation or benefits. The Corporation does not provide him any bonus, insurance benefits or retirement program. *Meisner Aff.*, ¶ 9. In addition to his position as President and CEO of the corporation, William V. McCann, Jr. also practices law on a part-time basis. He devotes approximately 80% of his time to his duties as President and CEO of the Corporation and approximately 20% of his time to his part-time law practice. *See* Affidavit of William V. McCann, Jr., ¶ 8.

F. Financial Transactions With Gertrude McCann

When the corporation was formed in 1974, Bill, Sr. and Gertrude McCann transferred certain moneys and properties into the Corporation. In return, they received stock and a promissory note. Bill, Sr., did not take a salary at that time. When he took draws or when the Corporation paid their personal bills, they were treated as "owner draws" and applied against the promissory note and interest was accumulated on the debt. Eventually, the loan was paid off. *See* Snowball Aff., ¶ 19.

After the note to Mr. and Mrs. McCann was retired, Bill, Sr., continued to take draws, which were then accounted for as "owner draws" and any personal expenses that were advanced by the Corporation were applied to an "amount receivable." In approximately 1986/87, the IRS did an extensive corporate audit that was triggered by a large earth moving project to ready the ground to build Shopko and Tidyman's. At the conclusion of the audit, the IRS determined that

portions of the earth moving costs could be depreciated but others could not. In addition, the IRS found that certain portions of personal expenses were being deducted as business expenses when, in fact, they were not actually business expenses. The IRS and the Corporation's attorney, Cumer Green, determined percentages that were actual business expenses, i.e., a percentage of the phone bill, utilities, fuel, mileage, travel, etc., which the IRS approved. That is when the "amount receivable" from Bill, Sr., began to increase each year. Interest has been charged each year upon the balance at a fair rate depending on the market rate. Neither the IRS nor the State Tax Commission have questioned the deductions since that settlement was reached with the IRS. *Id.* at ¶ 20.

When Bill, Sr., passed away in 1997, the balance of the receivable, according to the minutes of the Corporation, was in the amount of \$81,360.29. Following Bill Sr.'s death, the Corporation started a new account for personal expenses of Gertrude McCann to keep pre-death and post-death accounts, but both receivables are from the same types of expenses. After Bill Sr., died, Gertrude did not change the way she did things. For example, every month she would bring in her utility bill, a credit card bill for fuel, and her telephone bill for payment by the Corporation. If she has any work done to the Honda car that the Corporation owns, the bill comes to the Corporation for payment. Gertrude's personal expenses for her utilities, fuel and telephone are paid by the Corporation and later posted to a receivable account. At the end of each year, the accountant for the Corporation prepares a journal entry to allocate the expenses to the receivable from Gertrude together with any interest that has accrued on the debt that is due from Gertrude through the end of the year. *Id.* at ¶ 21.

In 1988, the Corporation built a large shop on ground owned by Bill Sr. and Gertrude McCann where their residence was located. At a Special Meeting of the Board of Directors on

September 6, 2000, it was recognized that the Corporation had never paid any rent to Bill Sr. and Gertrude for ground rent where the corporate shop was built. This is a large four-bay shop with 5 large shop doors. The building is 40' by 100' in size upon their property. The only access to the shop is over their driveway. The Directors researched what a fair rent on this type of property would have been for the 12 ½ years between 1988 to 2000 and determined that \$5,500 per year plus accrued interest would be fair rent for the use of the property by the Corporation. The total amount due from March 1, 1988 through August 1, 2000, was \$106,000. Thus, the Board authorized the Corporation to execute and deliver to Gertrude McCann a promissory note in the amount of \$106,000. *Id.* at ¶ 22.

After the September 6, 2000 Board Meeting, the Corporation prepared the promissory note from the Corporation to Gertrude McCann in the amount of \$106,000 payable in five annual installments with interest at 7.5% per annum. As of December 31, 2000, the balance owed to the Corporation by Gertrude McCann was \$115,987. It was the intent of the Board that the Corporation and Gertrude would each issue a promissory note to evidence these respective obligations. *Id.* at ¶ 23.

No action was taken to get the promissory note signed by Gertrude until 2006. As of December 31, 2005 the balance owed by Gertrude to the Corporation was \$165,341 and the amount owed to Gertrude on the promissory note was \$106,000 plus accrued interest. The accountant for the Corporation recommended that the notes be amortized over a 5 year term with each party issuing a check each year. Checks were exchanged between the Corporation and Gertrude in December of 2009. *Id.* at ¶ 24.

In 2006, Gertrude signed the note from her to the Corporation in the amount of \$165,341. Since the date of the note, the Corporation has kept track of the accrued interest and the ongoing

payments that are advanced for Gertrude's personal expenses. Thus, the Corporation holds a promissory note from Gertrude and has an account receivable from Gertrude that is reflected in the financial statements of the Corporation. The promissory note from the Corporation to Gertrude was not posted to the books of the Corporation until December of 2009 because the accountant for the Corporation was waiting until Gertrude and the Corporation traded checks at which time the note to the Corporation would have been posted and the payment treated as a deductible rent expense of the Corporation. Because the parties did not trade checks until December of 2009, the accountant instructed the Corporation to post the promissory note payable on the books of the Corporation for the year 2009. *Id.* at ¶ 25.

G. Purchase of Gertrude's Residence and Payments to Her to Maintain the Property

In December of 2000, the Corporation purchased the family home of Bill, Sr. and Gertrude McCann, from Gertrude McCann, subject to a life estate retained by Gertrude McCann. She resides on the property and maintains the property with the assistance of a handyman that is paid by the Corporation. *See Affidavit of William V. McCann, Jr., ¶ 18.*

Since January of 2001, the Corporation has been paying Gertrude McCann to reimburse her for her time and expenses incurred in the maintenance and repair of property owned by the Corporation. That property consists of a home, barn, shop and several out buildings set on 35 acres, which is all fenced and approximately one half of which is irrigated with hand lines in the summer. Gertrude McCann receives a 1099-MISC each year, which is filed with the Idaho State Tax Commission and IRS for the monthly payments, which is currently \$1,000.00 per month and she pays the appropriate tax on that income. The Corporation deducts the expense on its tax return each year. The amount paid to Gertrude McCann for her time and expenses incurred for the maintenance and repairs to the property is an amount which the Board of Directors and Mrs.

McCann have determined is a reasonable amount. Neither the State of Idaho nor the IRS have ever questioned this deduction in the returns of the Corporation. This is a legitimate expense of the Corporation and does not expose the Corporation to any material risk of liability for tax fraud. *Id.* at ¶ 19; Snowball Aff., ¶ 16.

H. The Corporation's Independent Financial Controls

The Corporation employs the services of an independent certified public accountant. Dorothy Snowball has served as the Corporation's accountant since 1988, and the Corporation relies upon her to prepare annual state and federal income tax returns, review the Corporation's general ledger, provide journal entries for the corporation's preparation of financial statements on an annual basis and provides general accounting and tax advice to the Corporation as needed. *See* Snowball Aff., ¶ 6.

In the 21 years that Dorothy Snowball has been serving as the accountant for the Corporation and preparing its tax returns, neither the State of Idaho nor the IRS have questioned any deductions taken by the Corporation or any returns filed by the Corporation. *Id.* at ¶ 17.

V. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). "[A] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for

purposes of summary judgment.” *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

Generally, when considering a motion for summary judgment, a court “liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor.” *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). Here, however, Plaintiff's only cause of action is an equitable action for dissolution of the Corporation and, therefore, this case would be tried to the Court without a jury. Under such circumstances, “summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.” *Pinehaven Planning Board*, 138 Idaho 826, 828, 70 P.3d 664, 666 (2003); *see also Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001) (“When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.”).

VI. ARGUMENT

A. Dissolution Of A Corporation Is Rarely Ordered

While the Idaho Code provides a mechanism for dissolution of a corporation, such a remedy is exceptional in nature and rarely granted by the courts. As explained in CJS CORPORATIONS § 923:

The courts recognize the drastic nature of involuntary dissolution as a remedy and reluctantly apply it only when the limited and specific statutory grounds for that relief are clearly established. Courts have said that the remedy of liquidation must be invoked with extreme caution, and that courts should resort to dissolution

only to prevent irreparable injury, imminent danger, or loss or miscarriage of justice.

Id.; see also *Carlson v. Hallinan*, 925 A.2d 506, 543 (Del. Ch. 2006) (explaining that the court should exercise its power to dissolve a corporation only with “great restraint” and only upon a “strong showing” of “gross mismanagement, positive misconduct by corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented”) (citations omitted).

B. Plaintiff's Claim For Dissolution of The Corporation Requires a Showing of Both (1) Shareholder Oppression, and (2) Irreparable Harm To The Corporation

Idaho Code § 30-1-1430 provides, in relevant part:

The Idaho district court... may dissolve a corporation:

....

(2) In a proceeding by a shareholder if it is established that:

(a) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered because of the deadlock.

(b) The directors or those in control of the corporation have acted or are acting in a manner that is illegal, oppressive or fraudulent, and irreparable injury to the corporation is threatened or being suffered by reason thereof...

(c) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two (2) consecutive annual meeting dates to elect successors to directors whose terms have expired;

Id. (emphasis added).

Here, Plaintiff has sought dissolution under subsection (2)(b), which contains two distinct elements: (1) the directors or those in control of the corporation have acted or are acting in a manner that is illegal, oppressive or fraudulent; and (2) that “irreparable injury to the corporation

is threatened or being suffered by reason thereof.” (Emphasis added). Notably, the Idaho statute is unique in requiring irreparable injury to the corporation. Idaho Code § 30-1-1430 is similar to the comparable section in the Model Business Corporation Act, but contains a few key differences. (Copies of Idaho Code § 30-1-1430(2)(b) and MBCA § 14.30 are attached hereto as Exhibits 1 and 2). For example, under both the MBCA and Idaho Code § 30-1-1430, a corporation can be dissolved where “the directors are deadlocked in the management of the corporate affairs.” Under both the Idaho statute and the MBCA, the director deadlock provision also contains the additional requirement that “irreparable injury to the corporation is threatened or being suffered.” Thus both the Idaho statute and the MBCA contain a two part test with regard to the director deadlock provision.

Both the Idaho statute and the MBCA contain a requirement that the directors or those in control of the corporation have acted “in a manner that is illegal, oppressive, or fraudulent.” This is the first element upon which Plaintiff relies in his cause of action for dissolution of the corporation. Under the MBCA, the oppression provision is a one-part test, requiring only a showing of shareholder oppression, and not requiring irreparable harm to the corporation. In contrast to the MBCA, the Idaho statute adds the second requirement that “irreparable injury to the corporation is threatened or being suffered by reason thereof.” The Idaho legislature could have followed the MBCA and omitted a requirement of irreparable injury to the corporation in the case of shareholder oppression, but it chose not to. Instead, the Idaho legislature elected to add the irreparable injury requirement.

There is only one published Idaho opinion addressing the corporate dissolution statute, and that case emphasizes the requirement of irreparable injury to the corporation. In *Gillingham v. Swan Falls Land & Cattle Co., Inc.*, 106 Idaho 859, 862, 683 P.2d 895, 898 (Ct. App. 1984),

the Idaho Court of Appeals emphasized that a court may liquidate a corporation only “[w]hen statutory requirements are met.” *Id.* In *Gillingham*, the Court addressed the director deadlock provision of the dissolution statute rather than the shareholder oppression provision, but the Court’s analysis is equally applicable to the shareholder oppression provision. After finding that the directors were deadlocked, the Court then went on to address the second statutory requirement – irreparable injury to the corporation. The Court explained that there must be irreparable injury “as a consequence” of the director deadlock. *Id.*, 106 Idaho at 862. The Court found that this requirement was satisfied because the director deadlock was preventing any action from being taken by the corporation, which effectively “paralyze[d]” the corporation. *Id.*

The Court then went on to explain that, even if the statutory requirements are satisfied, dissolution of the corporation is in the discretion of the court. *Id.* at 862. In exercising its discretion, the Court should consider certain factors and interests. *Id.* “In considering whether to dissolve a corporation, the most relevant factor to be considered is the best interests of the shareholders which is reflected to a large degree in the profitability of the corporation.” *Id.*

C. As a Matter of Law, Plaintiff Cannot Establish That “Irreparable Injury To The Corporation Is Threatened Or Being Suffered”

1. Alleged Injury To A Shareholder Is Not Injury To The Corporation

Under the clear language of the statute, and as confirmed in *Gillingham*, the Plaintiff must establish (1) oppression, and (2) irreparable injury to the corporation. Plaintiff’s clam for dissolution fails because Plaintiff cannot establish irreparable injury to the corporation. In fact, Plaintiff’s Amended Complaint does not even allege injury to the Corporation, instead asserting only injury to himself as a shareholder. Plaintiff’s Complaint alleges that the Corporation “does not provide benefits to its shareholders consistent with their reasonable expectations. This does threaten irreparable harm to the corporation.” Amended Complaint, ¶ 40.

Plaintiff offers no logical connection between "shareholders" not having their reasonable expectations met and the supposed threat of irreparable harm to the Corporation. As explained in *Gillingham*, only after the statutory requirements are established does the Court consider the interests of the individual shareholders. Plaintiff's failure to establish irreparable injury to the corporation is fatal to Plaintiff's cause of action for dissolution of the corporation pursuant to Idaho Code § 30-1-1430(2)(b).

2. Plaintiff Cannot Establish That Irreparable Injury To The Corporation Is "Being Suffered" Or Is "Threatened"

An Idaho shareholder cannot force dissolution of a corporation simply because he is unsatisfied with the return on his investment. Faced with the reality that Plaintiff has not even alleged injury to the Corporation, Plaintiff has now crafted a creative, but defective, argument in support of his dissolution cause of action. Plaintiff's new theory is that William V. McCann, Jr. and Gary E Meisner have caused the Corporation to engage in tax fraud in violation of 26 U.S.C. § 7201 and that the so-called tax fraud exposes the Corporation to tax penalties from the IRS. Plaintiff's allegations of tax fraud are based on Plaintiff's contention that (1) William V. McCann, Jr.'s annual salary of \$160,000 is excessive, and (2) that the Corporation's payment of \$1,000 per month to Gertrude McCann for the maintenance and repair of property owned by the Corporation in which Gertrude McCann holds a life estate² is wrongful. As an initial matter, any

² Plaintiff also asserts that Gertrude McCann has improperly been paid "consulting fees." As Plaintiff knows, however, the Corporation has not paid any consulting fees to Gertrude McCann since August 2000, almost ten years ago. See Affidavit of William V. McCann, Jr., p. 20. The corporate accounting records have been provided to Plaintiff, and Plaintiff has never contended that consulting fees have been paid after August 2000. In fact, Judge Reinhardt explained in the District Court Opinion in *McCann I* (pages 4-5, attached as Exhibit 4 to the Defendants Motion to Dismiss) that the Board of Directors voted to stop

(continued . . .)

contention that these allegations constitute tax fraud is absurd. Plaintiff asserts that the Corporation is worth over \$20 Million. *See* Amended Complaint, ¶ 22. The contention that a salary of \$160,000 to the President and CEO of such a corporation is so excessive that it constitutes tax fraud does not even pass the smell test. It is equally absurd to contend that tax evasion is committed by paying Gertrude McCann \$1,000 per month for her time and expenses incurred in the maintenance and repair of property owned by the Corporation in which Gertrude McCann holds a life estate. That property consists of a home, barn, shop and several out buildings set on 35 acres, which is all fenced and approximately one half of which is irrigated with hand lines in the summer.

To satisfy the elements for dissolution of a corporation Plaintiff must establish that irreparable injury to the corporation is either (1) “being suffered” or (2) “threatened”. “Irreparable injury” has generally been defined as injury that “is not remote or speculative, but actual and imminent and for which monetary damages cannot adequately compensate.” *Tillery v. Leonard & Sciolla, LLP*, 437 F.Supp.2d 312, 329 (E.D. Pa. 2006) (emphasis added). Here, not only are plaintiff’s allegations of tax fraud absurd, but any assertion that the corporation will be subjected to irreparable injury is far too speculative to satisfy Plaintiff’s burden. “[W]hile reasonable inferences must be drawn in favor of the non-moving party, the non-moving party cannot rest upon mere speculation.” *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007).

(. . . continued)

paying consulting fees in September 2000. Any pre-2001 conduct was resolved in *McCann I*, and this Court has already indicated that this action should involve “events that took place after January 5, 2001.”

Plaintiff cannot claim that irreparable injury to the corporation is “being suffered,” i.e., that the Corporation has already suffered irreparable injury. Plaintiff offers only the conclusory assertion that the Corporation might possibly, someday and somehow, be subjected to tax penalties, but it is undisputed that no such tax penalties have been levied by the IRS or a state taxing agency. Thus, no injury of any kind is “being suffered.”

Moreover, Plaintiff cannot even raise a material issue of fact that irreparable injury is “threatened.” “Threat” is generally defined as “[a] communicated intent to inflict harm or loss on another.” *See* Black’s Law Dictionary (7th ed. 1999). Plaintiff does not (nor can he) allege that the Corporation is being investigated for tax fraud or even that the corporation is being audited by the IRS. Neither the Idaho State Tax Commission nor the IRS has ever objected to the amount of the salary paid to William V. McCann, Jr. or to the payments to Gertrude McCann. Neither the Corporation, nor its accountant, have ever received any threat or criticism or notice of deficiency from the IRS relating to the salary paid to William V. McCann, Jr. or the payments to Gertrude McCann. *See* Snowball Aff., ¶ 17. Thus, despite the fact that the transactions and/or payments that Plaintiff contends are wrongful occurred long ago or have been occurring for a long time, no IRS action has been “threatened.” Plaintiff’s pure speculation that the IRS might possibly, somehow and someday, find a violation of tax laws does not satisfy Plaintiff’s burden.

3. The Type Of Injury Plaintiff Alleges Is Not “Irreparable”

Moreover, even ignoring the speculative nature of Plaintiff’s allegations, the type of injury alleged by Plaintiff is not “irreparable” because it is the kind of injury that could be compensated for through money damages. The Idaho Supreme Court has defined “irreparable” damage as an “injury which cannot be adequately compensated for monetarily.” *See Utah*

Power & Light Co. v. Idaho Public Utilities Com'n, 107 Idaho 47, 51 (1984) (citing Black's Law Dictionary). This Court has similarly recognized this principle in its Order granting in part and denying in part Defendants' motion to dismiss. *See* March 4, 2009 Order (explaining that Plaintiff "will have to prove irreparable rather [than] reparable injury to the corporation") (emphasis in original).

Plaintiff alleges that William V. McCann, Jr. and Gary E. Meisner are subjecting the Corporation to a potential tax liability. Thus, the "injury" that Plaintiff alleges might possibly occur is that the Corporation will owe the IRS a monetary penalty. This risk of monetary injury is not "irreparable." If the Board of Directors' actions were to lead to a tax liability to the Corporation, any monetary harm to the Corporation could be remedied through a damages award against those individuals. There is no allegation (nor could a reasonable inference be drawn) that any tax penalty would be so large that it would irreparably injure the Corporation. Rather, even if the IRS were to question these payments, the only conceivable consequence would be the imposition of some monetary penalty that would not be material, would be easily payable from cash on hand and would certainly not result in irreparable injury to the Corporation. *See* Snowball Aff., ¶ 18.

Moreover, the allegation of injury to the Corporation is not "irreparable" because the injury, if any, could be remedied by an action at law. In *Hall v. Glenn's Ferry Grazing Ass'n*, 2006 WL 2711849 (D. Idaho 2006), as is the case here, the plaintiff brought a corporate dissolution action under Idaho Code § 30-1-1430(2)(b) based on a theory of a shareholder freeze-out. The court explained that the plaintiff was required to satisfy the two-part test required by the statute: (1) that the defendants were acting in a manner that was illegal, oppressive or fraudulent, and (2) that "this conduct threatened [the corporation] with irreparable injury." *Id.* at

*10. The Plaintiff complained that the group in control of the corporation had improperly changed the articles and by-laws of the corporation, and that this improper change threatened irreparable injury. The court rejected this argument, finding that there was no threat of “irreparable injury” because the conduct complained of could be remedied through an action at law:

With regard to the changes to the Articles and By-Laws, there is nothing on their face that poses a threat of irreparable injury or even that would inevitably freeze out Hall from ever serving on the Board of Directors. . . . If the changes were improperly instituted, Hall could have filed suit to set them aside, and the availability of that option means that the corporation was not faced with a threat of irreparable harm that required its dissolution.

Id. at *11 (emphasis added).

The same analysis applies here. Plaintiff alleges that William V. McCann, Jr. and Gary E. Meisner have improperly caused the Corporation to pay William V. McCann, Jr. an excessive salary and to pay Gertrude McCann \$1,000 per month to reimburse her for maintenance expenses. If there is any merit to these allegations, any wrongful conduct can be remedied through an action at law. As both this Court and the Idaho Supreme Court have already held, Plaintiff’s claims for excessive compensation and misuse of corporate assets are derivative causes of action. Thus, Plaintiff’s remedy is to bring a derivative action, which Plaintiff has already tried on multiple occasions without following the required procedures. If the conduct complained of were to be found wrongful, a derivative action would result in an award of damages against the corporate directors that would remedy any wrongful conduct. As Judge Winmill found in *Hall*, “the availability of that option [for an action at law] means that the corporation was not faced with a threat of irreparable harm that required its dissolution.”


Finally, any contention that the Corporation is suffering irreparable injury is debunked by the fact that the Corporation has recorded a profit during each of the last seven years. In fact, the Corporation has remained profitable even in the current economy, which is remarkable given that the majority of the Corporation's business is in commercial real estate. As explained by the Idaho Court of Appeals, "[i]n considering whether to dissolve a corporation, the most relevant factor to be considered is the best interests of the shareholders which is reflected to a large degree in the profitability of the corporation." *Gillingham v. Swan Falls Land & Cattle Co., Inc.*, 106 Idaho 859, 862 (Ct. App. 1984).

VII. CONCLUSION

The second cause of action of Plaintiff should be dismissed because Plaintiff cannot prove the essential element of irreparable injury or the threat of irreparable injury to the Corporation as a consequence of any actions of Defendants.

DATED THIS 14th day of January, 2010.

MCDEVITT & MILLER LLP

By 
Charles F. McDevitt, ISB No. 835
Attorneys for Nominal Defendant McCann
Ranch & Livestock Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of January, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MCCANN RANCH'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Timothy Esser
ESSER & SANDBERG, PLLC
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

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Andrew Schwam
SCHWAM LAW FIRM
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[Attorneys for Plaintiff]

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Michael E. McNichols
CLEMENTS BROWN
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Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

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Merlyn W. Clark, ISB No. 1026
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Defendant William V. McCann, Jr.]

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☐ Telecopy: 208.336.6912


Chas. F. McDevitt

ORIGINAL

2010 JAN 15 AM 10 41

DEPUTY *M. K. O'Neil*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

AFFIDAVIT OF JAMES A. SCHOFF IN
SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY
JUDGMENT

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2. Attached to this Affidavit are my personal biography and current resume, marked Exhibits 1 and 2.

3. I am a resident of Cleveland, OH where I reside with my wife, Anne.

4. Prior to 2005, Developers Diversified Realty Corporation, of which I am a founder and officer, acquired property in Eagle, Idaho for development. In the process of acquiring the property, I met Larry Durkin and Cumer Green. Mr. Durkin was a Director of McCann Ranch & Livestock Co. (the "Corporation") and Mr. Green was an attorney for the Corporation. I was invited to go hunting with them on land belonging to the Corporation where I met Bill McCann, Jr. After Larry Durkin resigned from the Board of Directors of the Corporation, Bill McCann, Jr. asked me to serve on the Board of the Corporation and I accepted.

5. I have served as an independent member of the Board of Directors of the Corporation since December 20, 2005.

6. I am not a relative, debtor, creditor, employee or employer of Bill McCann, Jr., Lori McCann or McCann Ranch & Livestock Co. I am in no way beholden to Bill McCann, Jr. or Lori McCann and I conduct my deliberations as a Director of the McCann Ranch & Livestock Co. in an independent manner, with due diligence and in the best interests of the Corporation.

7. I do not charge nor do I receive any compensation for my service on the Board of Directors other than a payment of \$200 for each meeting of the Board that I attend and reimbursement of my actual expenses incurred to attend a Board meeting.

8. The Corporation is managed by a Board of Directors, which consists of Gary E. Meisner, Lori A. McCann, Bill McCann, Jr. and myself.

9. The Corporation also has a Compensation Committee, which consists of Gary E. Meisner and myself, and a Dividend Committee, which also consists of Gary E. Meisner and myself.

10. On an annual basis, the Corporation's Dividend Committee meets and determines whether the Corporation is able to pay a dividend to shareholders. The Dividend Committee considers and discusses many factors in its deliberations about whether to recommend payment of a dividend to shareholders, including the then current financial status of the Corporation; the anticipated future financial needs of the Corporation, including capital needs and debt service; anticipated operations of the Corporation, including risks associated with the operations; the real estate owned by the Corporation and the real estate market conditions; the status of the leases owned by the Corporation, including issues such as the loss of the tenant, Tidymans; the need for operating cash, including the costs of funding the litigation brought by Ron McCann. The Dividend Committee then makes a recommendation to the Corporation's Board of Directors with regard to whether a dividend should be paid. The Dividend Committee will recommend payment of a dividend to shareholders only when the Corporation has disposable cash available for payment of a dividend and when it is prudent to do so.

11. I am informed that the Corporation issued no dividends between the time of its inception in 1974 and 2004, when it paid its first dividend of \$10,000, which was \$.04 per share. In 2007 the Corporation paid a dividend of \$25,000, which was \$.10 per share and in 2008 it paid a dividend of \$35,000, which was \$.14 per share. In 2007 and 2008, I participated in the deliberations of the dividend committee with Gary Meisner and we recommended the dividend payments in 2007 and 2008.

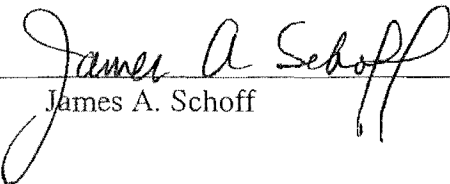
12. The salary of the Corporation's CEO and President is determined by the Corporation's Board of Directors after receiving the recommendation of the Compensation Committee, which consists of Gary E. Meisner and myself.

13. Bill McCann, Jr. serves as the President and CEO of the Corporation. In that position, he is responsible for the management and operation of the Corporation. From May 1, 1999 through 2006, Bill McCann, Jr. was paid an annual salary of \$144,000. In December of 2006, the Compensation Committee reviewed the salary of Bill McCann, Jr. The Compensation Committee noted that Bill McCann, Jr. had been paid the same salary since 1999 and determined that it was time for him to receive a salary that is more commensurate with his position and responsibilities. The Committee considered a variety of factors, including the responsibilities that are provided in his job description, a copy of which is attached to this Affidavit marked Exhibit 3. We considered the fact that he really has two jobs: one, operating the ranch side of the business; and two, operating the commercial property side of the business, which includes responsibilities for leasing, financing, developing and marketing the real estate of the Corporation, including issues such as tenant bankruptcies and store closings, the closing of Tidymans and the costs to maintain and relet such vacant space.

14. In December of 2006, the Compensation Committee recommended to the Board of Directors that the Corporation increase Bill McCann, Jr.'s salary to \$160,000 per year effective January 1, 2007 and that the salary be reviewed annually. The Compensation Committee re-evaluated the salary in 2007 and in 2008, each time recommending that the salary stay the same.

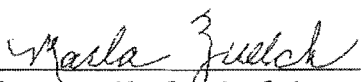
15. It is my opinion that Bill McCann, Jr.'s salary of \$160,000 per year is very favorable for the Corporation in light of the services he provides. If not for Bill McCann, Jr., the Corporation would need to hire outside legal counsel, a real estate leasing firm, a developer, and a finance officer to manage and operate the Commercial business of the Corporation. On the ranch side, the Corporation would need to hire an experienced ranch manager with experience as a cattle buyer and additional help to perform ranch operations that are performed by Bill McCann, Jr. and Lori McCann. Moreover, the Corporation would have to hire someone to manage the Corporation's timber lands.

16. Other than his salary and the use of a Corporation vehicle, Bill Jr. receives no other compensation or benefits from the Corporation for his services as CEO and President.


James A. Schoff

STATE OF OHIO)
) ss.
County of Cuyahoga)

SUBSCRIBED AND SWORN before me this 12th day of January_____, 2010.


Name: Marla Zuelch **MARLA ZUELCH**
Notary Public for Ohio **Notary Public, State of Ohio**
Residing at 12703 Sheldon Rd., Mantua, OH **My Commission Expires March 1, 2010**
My commission expires _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of January, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF JAMES A. SCHOFF by the method indicated below, and addressed to each of the following:

Timothy Esser
ESSER & SANDBERG, PLLC
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

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Andrew Schwam
SCHWAM LAW FIRM
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Moscow, ID 83843
[Attorneys for Plaintiff]

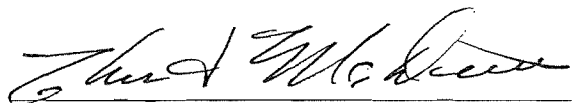
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Chas. F. McDevitt

EXHIBIT 1

AFFIDAVIT OF JAMES A. SCHOFF IN SUPPORT OF DEFENDANT MCCANN RANCH'S MOTION
FOR SUMMARY JUDGMENT

758

James A. Schoff

Mr. Schoff graduated from Hamilton College (1968) and Cornell University Law School (1972), and then spent nine years with the highly-respected law firm of Thompson, Hine & Flory, specializing in partnership, tax, corporate and business law. While affiliated with Thompson, Hine & Flory, Jim was principally responsible for acquisitions/dispositions of businesses for major companies, and for syndications and joint ventures engaging in real estate and equipment oriented transactions represented by the law firm.

In 1981, Jim left that firm to become a general partner of Diversified Equities, a move which enabled him to devote his full efforts to the business of equity capital formation and the structuring and syndication of tax advantaged investments. Diversified Equities engaged in a variety of venture capital and tax advantaged investments, ranging from the ownership and operation of retail shopping centers, cable TV, river barges and office buildings during the next twelve years.

In February 1993, Diversified Equities joined with Developers Diversified to form a real estate investment trust (REIT), named Developers Diversified Realty Corporation (DDR), which is traded on the New York Stock Exchange. DDR is a self-administered and self-managed equity REIT with more than 148 million square feet of leaseable space in its portfolio of more than 670 retail and development properties located in 44 states, Brazil, Canada and Puerto Rico. Mr. Schoff was a Founder and served as a Director of the Company, and as Executive Vice President and Chief Operating Officer of DDR from 1993 to 1998. In 1998, he became Vice Chairman and Chief Investment Officer of DDR, and continued to serve on DDR's Board until 2002. In 2002, he assumed his current role as Special Advisor to the Chairman and CEO of DDR. Mr. Schoff also serves as a Director of Associated Estates Corporation, a NYSE publicly owned real estate investment trust, specializing in multi-family housing.

Mr. Schoff is past president and a current member of the Board of Directors of the Western Reserve Historical Society. He is also a Trustee of the Diversity Center, a member of the Board of Directors of the Greater Cleveland Sports Commission, and also a past president and member of the Board of Trustees of the Near West Theatre. Jim currently lives in Cleveland with his wife, Anne.

EXHIBIT 2

AFFIDAVIT OF JAMES A. SCHOFF IN SUPPORT OF DEFENDANT MCCANN RANCH'S MOTION
FOR SUMMARY JUDGMENT

760

JAMES A. SCHOFF

Academic Background:

Hamilton College (1964-1968) – A.B.

Cornell Law School (1968-1972) – one year off for Army Reserve Basic Training) – J.D.

Work Experience:

1972-1981 – Thompson Hine & Flory

1981-1993 – Diversified Equities – Capital formation and syndication company

1993 – Present – Developers Diversified Realty Corporation, a NYSE listed REIT

- Executive Vice President and Chief Operating Officer (1993–1998)
- Vice Chairman and Chief Investment Officer (1998-2002)
- Senior Investment Officer (2002 –2004)
- Special Advisor to the Chairman & CEO (2005 to Present))
- Board of Directors (1993-2002)

Civic & Philanthropic Affiliations:

- (1) Western Reserve Historical Society – Board of Trustees (1995 to Present); Chairman (2003 – 2007)
- (2) Near West Theatre – Board of Trustees (1998 to Present); Chairman (2000 - 2004)
- (3) National Conference for Community and Justice (NCCJ) - Trustee (1997 to Present) (Now called “Diversity Center of Northeast Ohio”)
- (4) Greater Cleveland Sports Commission – Trustee (2005 to Present)

Club Affiliations –

Barrington Golf Club – Developer and Member (1993 to 2008)
Pepper Pike Country Club – Member (September, 2001 - Present)
Sage Valley Country Club – Member (2003 – Present)

EXHIBIT 3

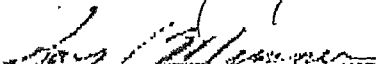
AFFIDAVIT OF JAMES A. SCHOFF IN SUPPORT OF DEFENDANT MCCANN RANCH'S MOTION
FOR SUMMARY JUDGMENT

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CONSENT MINUTES OF BOARD OF DIRECTORS
OF MCCANN RANCH AND LIVESTOCK CO.
ON JUNE 9, 1999

The undersigned directors of McCann Ranch and Livestock Co. do hereby waive notice of the June 9, 1999, special meeting of the Board of Directors and consent to the conduct of any business as set forth below.


William Vern McCann, Jr.

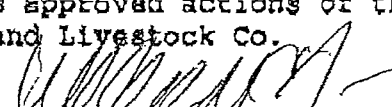

Gary E. Meisner



Larry J. Durkin

Approval of Job Description

Attached hereto as Exhibit 'A' is a Job Description for the President and CEO of McCann Ranch and Livestock Co. Said job description is hereby approved by the Board of Directors and shall be effective July 1, 1999 until rescinded by action of the Board of Directors of this Corporation.

Consented to and agreed upon as approved actions of the Board of Directors of McCann Ranch and Livestock Co.


William Vern McCann, Jr.


Gary E. Meisner



Larry J. Durkin

CONSENT MINUTES OF BOARD OF DIRECTORS
OF MCCANN RANCH AND LIVESTOCK CO.
ON JUNE 9, 1999

The undersigned directors of McCann Ranch and Livestock Co. do hereby waive notice of the June 9, 1999, special meeting of the Board of Directors and consent to the conduct of any business as set forth below.



William Vern McCann, Jr.



Gary E. Meisner

Larry J. Durkin


Approval of Job Description

Attached hereto as Exhibit "A" is a Job Description for the President and CEO of McCann Ranch and Livestock Co. Said job description is hereby approved by the Board of Directors and shall be effective July 1, 1999 until rescinded by action of the Board of Directors of this Corporation.

Consented to and agreed upon as approved actions of the Board of Directors of McCann Ranch and Livestock Co.



William Vern McCann, Jr.



Gary E. Meisner

Larry J. Durkin

McCANN RANCH & LIVESTOCK CO.

Job Description - President and CEO

Duties

1. The president shall be the chief executive officer of the corporation. He shall be responsible for general management of the business of the corporation and general supervision of the other officers. He shall reside at all meetings of the stockholders and of the board of directors and see that all orders and resolutions of the board are carried into effect; subject, however, to the right of the board to delegate to any other officer or officers of the corporation any specific powers, other than those that may be by law conferred only upon the president. He shall execute in the name of the corporation all deeds, bonds, mortgages, contracts and other documents authorized by the board of directors, except in cases where the execution thereof shall be expressly delegated by the board or these by-laws to some other officer or agent of the corporation. He shall be ex-officio a member of all standing committees, and shall have the general powers and duties of supervision and management usually vested in the office of president of a corporation.
2. Seek and analyze new corporate opportunities, particularly within the present sphere of operations of the Corporation and continue to search for quality businesses to occupy the vacant commercial and industrial land.
3. Manage the commercial properties including the ongoing leases and contents of the existing improved properties. This is to include renewing any and all leases in a timely manner, collect all rents and keeping all loan payments current. Increase the values and cash flows of the commercial properties.
4. Manage the land and cattle operations to their highest economic return. This is to include preg-testing all cows to assist in the culling process, to research new breeds, and to maintain, or replace the herd with the best economic breed for this area and economic times.
5. Manage the single-family residence for the best economic return, keeping in mind other factors that may benefit the company.
6. Understand that refinancing should be accomplished on existing properties if there is an economic advantage. Assess mortgages and refinance loans to improve cash flows.
7. Employ whatever additional help is necessary to conduct the ongoing business of the corporation. Employ additional people, or hire outside consultants where necessary, to improve company operations.

JOB DESCRIPTION - 6/9/99 - 1

8. Insure that all properties remain in a good state of repair. Repair and maintain all properties when necessary.
9. Insure that all taxes and other expenses be paid in a timely manner. Pay all property taxes when due, and assess insurance policies to insure the company is adequately protected.
10. Insure that accepted accounting procedures be maintained for all operations, assets and liabilities, income, expenses and tax filings.
11. See that the corporation keeps records on all corporate activities and report to the Board of Directors at least annually.

JOB DESCRIPTION - 6/9/99 - 2

Chas. F. McDevitt (ISB No. 835)
Dean J. Miller (ISB No. 1968)
MCDEVITT & MILLER LLP
420 West Bannock Street
P.O. Box 2565-83701
Boise, ID 83702
Tel: 208-343-7500
Fax: 208-336-6912

2010 JAN 15 AM 10 41

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

AFFIDAVIT OF WILLIAM V.
MCCANN, JR. IN SUPPORT OF
DEFENDANT MCCANN RANCH'S
MOTION FOR SUMMARY JUDGMENT

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2. I am the President and CEO of the McCann Ranch & Livestock Co. Inc.

3. The McCann Ranch & Livestock Co. (the "Corporation") is an Idaho corporation with assets in and around Lewiston, Idaho. The Corporation owns commercial and undeveloped property. The Corporation also owns and manages timberland, ranchland and a cattle herd.

4. My father, William V. McCann, Sr. ("Bill, Sr.") formed the Corporation in 1974, and transferred to the Corporation ranch and timber lands and some undeveloped commercial land that is located in or around Lewiston, Idaho. Over the next several years, Bill, Sr. gifted each of his sons, Plaintiff Ronald R. McCann and myself, 36.7% of the shares of the Corporation. Following my father's death in 1997, his will bequeathed the remaining shares of the Corporation in trust to Gary Meisner, for the benefit of our Mother, Gertrude McCann. This ownership of the shares has remained the same since my father's death.

5. The assets of the Corporation include the following:

Commercial Buildings that are leased to tenants:

Shari's Restaurant
Hollywood Video
Wild West Ranch Wear
Dollar Tree
Sterling Savings
Staples
Big 5
Cable One
2270 Thain Grade Mall (multi-tenant office building)

Land:

Ground that is leased to Shopko
Ground and building formerly occupied by Tidymans
Vacant commercial land, fenced and presently used for winter feeding
Vacant industrial land, fenced and presently used for winter feeding

Ranches:

Bovill Ranch – 700 acres with timber and pasture, a house, fencing and corrals
Forest Ranch – 2200 acres with timber and pasture, a cabin, fencing and corrals
River Ranch – 700 acres near Lewiston with 3 hay barns, fencing and corrals, used for winter pasture and feeding
Vernon Ranch – 700 acres on Central Grade with hay barns, fencing and corrals, used for winter pasture and feeding

Livestock:

300 mother cows
15 bulls
3 horses

Residential Properties:

Single-family residence at 1046 24th Street, Lewiston, Idaho, which is leased
35 acres with a residence, 4-bay shop, garage, barn and fencing at 310 Stewart, Lewiston, Idaho. The residence is occupied by Gertrude McCann.

6. At all times relevant to this action, the Corporation has been managed by a Board of Directors and various committees. The current Board of Directors consists of James A. Schoff, Gary E. Meisner, Lori A. McCann and William V. McCann, Jr. The Corporation also has a Compensation Committee, which consists of independent directors, James A. Schoff and Gary E. Meisner, and a Dividend Committee, which also consists of James A. Schoff and Gary E. Meisner.

7. In my capacity as President and CEO of the Corporation, I am responsible for the management and operations of the Corporation. My duties include managing the ranch operations, including the timberland, logging thereof together with slash disposal, annual tree planting and harvesting; managing the cattle, including cattle sales, bull selection and purchase together with the general health of the herd; and managing the commercial property operations, including developing, financing, marketing and leasing the real estate owned by the Corporation.

8. In addition to my position as President and CEO of the corporation, I also practice law on a part-time basis. Since October of 1997, I have devoted approximately 80% of my time to my duties as President and CEO of the Corporation, and approximately 20% of my time to my part-time law practice.

9. The salary paid to me as CEO and President by the Corporation is determined by the Board based upon the recommendation of the Corporation's Compensation Committee, of which I am not a member. Instead, the Compensation Committee consists of the independent directors, Gary E. Meisner and James A. Schoff, neither of which receives a salary or other compensation from the Corporation, other than a nominal stipend for attending Board meetings and reimbursement of expenses.

10. The financial transactions of the Corporation with our Mother, which have been ongoing for many years and were ongoing during the life of our Dad, Bill Sr., do not cause irreparable injury to the Corporation nor do they threaten irreparable injury to the Corporation.

11. When the corporation was formed in 1974, our Dad and Mother transferred certain moneys and properties into the Corporation. In return, they received stock and a promissory note. Our Dad did not take a salary at that time. When he took draws or when the

Corporation paid their personal bills, they were applied against the promissory note and interest was accumulated on the debt. Eventually, the loan was paid off.

12. After the note to our parents was retired, our Dad and Mother continued to take draws, which were then accounted for as “owner draws” and any personal expenses that were advanced by the Corporation were treated as overdraws and were applied to an “amount receivable.” In approximately 1986/87, the IRS did an extensive corporate audit that was triggered by a large earth moving project to ready the ground to build Shopko and Tidyman’s. At the conclusion of the audit, the IRS determined that portions of the earth moving costs could be depreciated but others could not. In addition, the IRS found that certain portions of personal expenses were being deducted as business expenses when, in fact, they were not actually business expenses. The IRS and the Corporation attorney, Cumer Green, determined percentages that were actual business expenses, i.e., a percentage of the phone bill, utilities, fuel, mileage, travel, etc., which the IRS approved. That is when the “amount receivable” from our Dad and Mother began to increase each year. Interest has been charged each year upon the balance at a fair rate depending on the market rate. Neither the IRS nor the State Tax Commission have questioned the deductions since that settlement was reached with the IRS.

13. When our Dad passed away in 1997, the balance of the receivable, according to the minutes of the Corporation, was in the amount of \$81,360.29. Because this was a community debt of our Dad and Mother, it was not paid off through the Estate of Bill, Sr. The Corporation then started a new account for personal expenses of our Mother to keep pre-death and post-death accounts, but both receivables are from the same types of expenses. After our Dad died, our Mother did not change the way she did things. For example, every month she would bring in her utility bill, a credit card bill for fuel, and her telephone bill for payment by the Corporation. If

she has any work done to the Honda car that the Corporation owns, the bill comes to the Corporation for payment. Our Mother's personal expenses for her utilities, fuel and telephone are paid by the Corporation and posted to a receivable account. At the end of each year, the accountant for the Corporation prepares a journal entry to allocate the expenses to the receivable from our Mother together with any interest that has accrued on the debt that is due from our Mother through the end of the year.

14. At a Special Meeting of the Board of Directors on September 6, 2000, it was recognized that the Corporation had never paid any rent to our parents for ground rent where the corporate shop was built upon ground owned by our Dad and Mother, and not the Corporation. This is a large four-bay shop with 5 large shop doors. The building is 40' by 100' in size upon their property. The only access to the shop is over their driveway. The Directors researched what a fair rent on this type of property would have been for the 12 ½ years between 1988 to 2000 and determined that \$5,500 per year plus accrued interest would be fair rent for the use of the property by the Corporation. The total amount due from March 1, 1988 through August 1, 2000, was \$106,000. Thus, the Board authorized the Corporation to execute and deliver to Gertrude McCann a promissory note in the amount of \$106,000.

15. After the September 6, 2000 Board Meeting, the Corporation prepared the promissory note from the Corporation to Gertrude McCann in the amount of \$106,000 payable in five annual installments with interest at 7.5% per annum. It was the intention of the Board that Gary Meisner would talk to our Mother at the appropriate time and explain to her that the Corporation owed her \$106,000 as back rent for the use of her land and that she and our Dad owed the Corporation for their personal expenses that the Corporation had been paying for many years. As of December 31, 2000, the balance owed to the Corporation by our Mom and Dad was

\$115,987. It was the intent of the Board that the Corporation and our Mother would trade promissory notes.

16. No action was taken to get the promissory note signed by our Mother until 2006. As of December 31, 2005 the balance owed by our Mother to the Corporation was \$165,341 and the amount owed to our Mother on the promissory note was \$106,000 plus accrued interest. The accountant for the Corporation recommended that the notes be amortized over a 5 year term with each party trading checks each year. We just never got around to doing what the accountant recommended until 2006.

17. In 2006, our Mother signed the note from her to the Corporation in the amount of \$165,341. Since the date of the note, the Corporation has kept track of the accrued interest and the ongoing payments that are advanced for our Mother's personal expenses. Thus, the Corporation holds a promissory note from our Mother and has an account receivable from our Mother that is reflected in the financial statements of the Corporation. The promissory note from the Corporation to our Mother was not posted to the books of the Corporation because the accountant for the Corporation was waiting until our Mother and the Corporation traded checks at which time the note to the Corporation would have been posted and the payment treated as a deductible rent expense of the Corporation. The accountant has recently instructed the Corporation to post the promissory note payable on the books of the Corporation and treat it as a deductible rent expense for the year 2009.

18. In December of 2000, the Corporation purchased the family home of our parents from our Mother, subject to a life estate retained by our Mother. The Corporation paid her the fair market value of the property purchased. She resides on the property and maintains the property with the assistance of a handyman that is paid by the Corporation. The Corporation

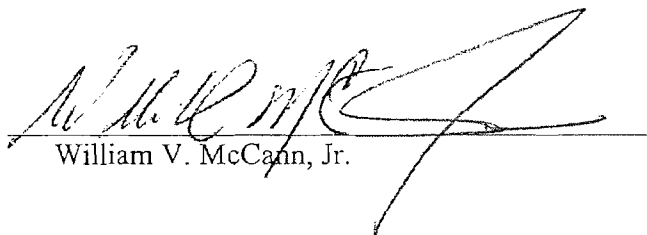
purchased the property because it was a good investment for the Corporation, the Corporation was already using part of the property for the Corporation's shop and equipment storage, and our Mother needed the proceeds of the sale.

19. Since January of 2001, the Corporation has been paying our Mother to reimburse her for her time and expenses incurred in the maintenance and repair of property owned by the Corporation. That property consists of a home, barn, shop and several out buildings set on 35 acres, which is all fenced and approximately one half of which is irrigated with hand lines in the summer. Our Mother receives a 1099-MISC each year, which is filed with the Idaho State Tax Commission and IRS for the monthly payments, which is currently \$1,000.00 per month and she pays the appropriate tax on that income. The Corporation deducts the expense on its tax return each year. The amount paid to our Mother for maintenance and repairs to the property is an amount which the Board of Directors and our Mother have determined is a reasonable amount to reimburse her for her time, and the maintenance and repairs to the property. Neither the State of Idaho nor the IRS have ever questioned this deduction in the returns of the Corporation. This is a legitimate expense of the Corporation and does not expose the Corporation to any material risk of liability for tax fraud.

20. The Corporation has not paid any consulting fees to Gertrude McCann since August 2000.

21. The Corporation employs the services of an independent certified public accountant. Dorothy Snowball has served as the Corporation's accountant since 1988 and the Corporation relies upon her to prepare annual state and federal income tax returns, review the Corporation's general ledger, provide journal entries for the corporation's preparation of

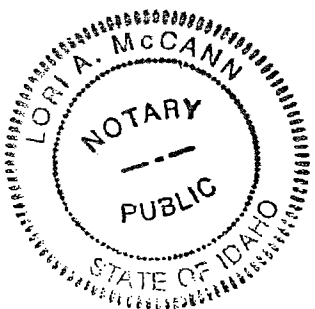
financial statements on an annual basis and provide general accounting advice to the Corporation as needed.

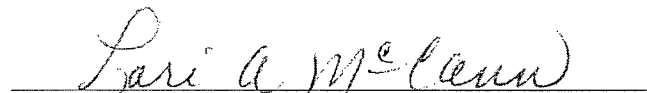


William V. McCann, Jr.

STATE OF IDAHO)
) ss.
County of Nez Perce)

SUBSCRIBED AND SWORN before me this 13th day of January, 2010..
~~December, 2009~~





Name: Lori A. McCann
Notary Public for Idaho
Residing at Lewiston
My commission expires 10-3-15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF WILLIAM V. MCCANN, JR. by the method indicated below, and addressed to each of the following:

Timothy Esser
ESSER & SANDBERG, PLLC
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy: 509.334.2205

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk, #6
Moscow, ID 83843
[Attorneys for Plaintiff]

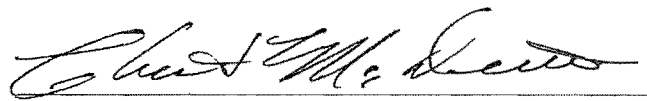
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy

Michael E. McNichols
CLEMENTS BROWN
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P.O. Box 1510
Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

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Merlyn W. Clark, ISB No. 1026
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Defendant William V. McCann, Jr.]

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Chas. F. McDevitt

ORIGINAL

Chas. F. McDevitt (ISB No. 835)
Dean J. Miller (ISB No. 1968)
MCDEVITT & MILLER LLP
420 West Bannock Street
P.O. Box 2565-83701
Boise, ID 83702
Tel: 208-343-7500
Fax: 208-336-6912

Attorneys for Nominal Defendant

FILED
2010 JAN 15 AM 10 41
PATTY O. WEEKS
CLERK OF THE DIST. COURT
D. Koehn

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and
GARY E. MEISNER,

Defendants.

McCANN RANCH & LIVESTOCK
COMPANY, INC.,

Nominal Defendant.

Case No. CV 08-01226

AFFIDAVIT OF DOROTHY
SNOWBALL IN SUPPORT OF
DEFENDANT MCCANN RANCH'S
MOTION FOR SUMMARY JUDGMENT

DOROTHY SNOWBALL, being first duly sworn upon oath, deposes and says:

1. I am over the age of eighteen and competent to attest to the following matters of my own personal knowledge.

2. I am a certified public accountant (CPA) within the state of Idaho and have been so licensed since 1977. I am also a CPA within the state of Colorado and have been so licensed since 2004.

3. I graduated with honors in accounting in 1961 from Woodbury College, Los Angeles, California. From 1961 to 1968, I served as a senior staff auditor for Touche Ross & Company in Los Angeles, California. From 1971 to 1977 I worked as the Corporate Secretary-Controller for Becker CPA Review Course of California in Encino, California. From 1977 to 1981, I served as manager of the tax division of Management Accounting, Inc. in Boise, Idaho. In 1981, while maintaining my private accounting practice, I worked for Franklin Oil Company, in Caldwell, Idaho as the Controller. I left Franklin Oil Company in 1982 and, while continuing my private practice, again managed the tax division of Management Accounting, Inc. until 1989 when I purchased this practice.

4. I have practiced accounting as a sole practitioner from 1981 to the present. My practice has included over 600 individual, partnership, and small corporation clients. In 2004, I sold a majority of my practice, retaining approximately 100 clients, which I presently serve. My professional experience includes the preparation of business and individual income tax returns and financial statements. A copy of my résumé is attached to this affidavit as Exhibit A.

5. Unless otherwise indicated, I make this affidavit based upon my personal knowledge. To the extent any of the following represents a statement of opinion, that opinion is held to a reasonable degree of certainty based upon my personal knowledge, experience and training as an accountant and upon information that accountants reasonably rely upon in forming opinions.

6. I have served as the accountant to the McCann Ranch & Livestock Co. (the "Corporation") since 1988 and have prepared the Corporation's tax returns on an annual basis since then. My services have also included reviewing the Corporation's general ledger and preparing journal entries to make corrections to accounts, record depreciation, record interest, record taxes, etc. in order for the Corporation to prepare financial statements. In addition, I have provided general accounting advice to the Corporation as needed.

7. Having served as the Corporation's accountant for the last 21 years, I am familiar with the Corporation's financial status and the transactions entered into by the Corporation.

8. The Corporation owns and manages commercial real estate and undeveloped property in the Lewiston, Idaho area. The Corporation also owns and manages timberland, ranchland and a cattle herd.

9. I understand that an allegation has been made by the Plaintiff in this litigation that the Corporation is being irreparably harmed as a result of the management of the Corporation. Based upon my knowledge of the financial affairs of the corporation, I know of no basis for that allegation. The Corporation is financially sound and has been profitable in each of the last seven years. As set forth in the Corporation's income statements, true and accurate copies of which are attached hereto as Exhibits B through H, the net income of the Corporation since December 31, 2001 has been as follows:

2008	\$138,139.62
2007	\$ 75,865.77
2006	\$309,067.25
2005	\$106,309.54
2004	\$ 23,180.69
2003	\$129,160.13
2002	<u>\$ 69,764.60</u>
TOTAL	\$851,487.60

10. The financial strength of the Corporation is further evidenced by the fact that it has remained profitable during the current economic downturn.

11. While the Corporation is profitable and financially sound, the Corporation is experiencing reduced cash flow. The reduction in cash flow is partly the result of the cost of this litigation and the loss of income from one of the larger commercial properties owned by the Corporation that is known as Tidymans.

12. In 2004, the Corporation refinanced its long-term debt to reduce the interest rates that were being paid upon various obligations of the Corporation. The Corporation borrowed \$6,100,000 from Protective Life Insurance Company. The monthly payments are \$58,741. Since the loan payments started on September 1, 2004, more than \$3,348,218 has been paid on the loan balance. The outstanding balance as of December 1, 2009 is \$3,935,646, which will be fully amortized over a period of 6 ½ more years. Refinancing the long-term debt was a prudent business decision. The rates of interest on the pre-existing debt ranged from 7.50% to 8.25%. The rate of interest on the Protective Life loan is fixed at 5.75%. The reduction in the debt of the Corporation will continue to increase the equity of the shareholders so long as revenues and other expenses of the Corporation remain relatively constant. The fact that the Corporation has made timely payments of approximately \$705,000 a year for the past five years to the insurance company shows that the Corporation is financially strong.

13. The current lawsuit has cost the Corporation in excess of \$250,000.00 in legal fees and costs.

14. The reduced cash flow has adversely affected the present ability of the Corporation to pay dividends to shareholders. Since the inception of the Corporation, the Corporation paid no dividends until 2004. The Corporation has since paid dividends as follows:

12/28/2004 (\$.04 per share) (Ron's share \$3,668) Total dividend paid \$10,000

1/17/2007 (\$.10 per share) (Ron's share \$9,170) Total dividend paid \$25,000

3/31/2008 (\$.14 per share) (Ron's share \$12,838) Total dividend paid \$35,000

TOTAL DIVIDENDS PAID: \$70,000

15. The Corporation pays its President and CEO, William V. McCann, Jr., a salary of \$160,000 per year. It is my understanding that Plaintiff alleges that the payment of this salary is excessive and subjects the Corporation to possible liability for tax fraud. I see no basis for this allegation. I am informed that William. V. McCann, Jr. spends approximately 20% of his time on his law practice and 80% of his time managing and operating the business of the Corporation. In my opinion, the amount of the salary is reasonable and does not create any threat of tax fraud from the state and federal taxing authorities. Neither the IRS nor the Idaho State Tax Commission has ever objected to the amount the Corporation was deducting for William V. McCann, Jr.'s salary.

16. In December of 2000, the Corporation purchased the family home owned by Gertrude McCann, the mother of Ronald McCann and William V. McCann, Jr. Since January of 2001, the Corporation has been paying Gertrude McCann to reimburse her for her time and expenses incurred in the maintenance and repair of the property. That property consists of a home, barn, shop and several out buildings set on 35 acres, which is all fenced and approximately one half of which is irrigated with hand lines in the summer. It is my understanding that Plaintiff alleges these payments subject the Corporation to liability for tax fraud. I see no basis for this allegation. Gertrude McCann receives a 1099-MISC each year, which is filed with the Idaho Tax State Commission and IRS for the current \$1,000.00 per month payment and she pays the appropriate tax on that income. The amount paid to Gertrude McCann

for maintenance and repairs to the property is an amount which the Board of Directors and Mrs. McCann have determined is a reasonable amount to reimburse her for her time, and the maintenance and repairs to the property. In my opinion, this is a legitimate expense of the corporation and does not expose the Corporation to any risk of liability for tax fraud.

17. Neither the Idaho State Tax Commission nor the IRS have ever objected to the amount of compensation that is paid to William V. McCann, Jr. or to the payments to Gertrude McCann for the maintenance and repairs to the property upon which she resides. Neither I nor the Corporation have ever received any threat or criticism or notice of deficiency from the IRS or the State Tax Commission relating to the compensation paid to William V. McCann, Jr. or the payments to Gertrude McCann. In fact, in all the years that I have been serving as the accountant for the Corporation and preparing its tax returns, neither the State of Idaho nor the IRS have questioned any deductions taken by the Corporation or any returns filed by the Corporation.

18. Even if the IRS were to question these payments, the only conceivable consequence would be the time involved in satisfying the IRS that these expenses are reasonable, and legitimate, deductible expenses of the Corporation.

19. It is my understanding that Plaintiff has raised questions concerning promissory notes from Gertrude McCann to the Corporation and from the Corporation to Gertrude McCann. When the corporation was formed in 1974, William V. McCann, Sr. ("Bill, Sr.") and Gertrude McCann transferred certain moneys and properties into the Corporation. In return, they received stock and a promissory note. Bill, Sr., did not take a salary at that time. When he took draws or when the Corporation paid their personal bills, they were treated as "owner draws" and applied against the promissory note and interest was accumulated on the debt. Eventually, the loan was paid off.

20. After the note to Mr. and Mrs. McCann was retired, Bill, Sr., continued to take draws, which were then accounted for as "owner draws" and any personal expenses that were advanced by the Corporation were applied to an "amount receivable." In approximately 1986/87 (the year before I began serving as the Corporation's accountant), the IRS did an extensive corporate audit that was triggered by a large earth moving project to ready the ground to build Shopko and Tidyman's. At the conclusion of the audit, the IRS determined that portions of the earth moving costs could be depreciated but others could not. In addition, the IRS found that certain portions of personal expenses were being deducted as business expenses when, in fact, they were not actually business expenses. The IRS and the Corporation's attorney, Cumer Green, determined percentages that were actual business expenses, i.e., a percentage of the phone bill, utilities, fuel, mileage, travel, etc., which the IRS approved. That is when the "amount receivable" from Bill, Sr., began to increase each year. Interest has been charged each year upon the balance at a fair rate depending on the market rate. Neither the IRS nor the State Tax Commission have questioned the depreciation deductions nor the interest income reported by the Corporation on the receivables from the McCann Estate and Gertrude McCann since that settlement was reached with the IRS.

21. When Bill, Sr., passed away in 1997, the balance of the receivable, according to the minutes of the Corporation, was in the amount of \$81,360.29. Because this was a community debt of Bill, Sr. and Gertrude McCann, it was not paid off through the Estate of Bill, Sr. The Corporation then started a new account for personal expenses of Gertrude McCann to keep pre-death and post-death accounts separate, but both receivables are from the same types of expenses. After Bill Sr., died, Gertrude did not change the way she did things. For example, every month she would bring in her utility bill, a credit card bill for fuel, and her telephone bill

for payment by the Corporation. If she has any work done to the Honda car that the Corporation owns, the bill comes to the Corporation for payment. Gertrude's personal expenses for her utilities, fuel and telephone are paid by the Corporation and later posted to a receivable account. At the end of each year, I would prepare a journal entry to allocate the expenses to the receivable from Gertrude together with an accrual for interest on the debt.

22. At a Special Meeting of the Board of Directors on September 6, 2000, it was recognized that the Corporation had never paid any rent to Bill, Sr. and Gertrude for ground rent when the corporate shop was built upon ground owned by Bill, Sr. and Gertrude, and not the Corporation. The Directors determined that a fair rent for the Corporation's use of this type of property was \$5,500 per year, plus interest. The total amount due from March 1, 1988 through August 1, 2000, was \$106,000. Thus, the Board authorized the Corporation to execute and deliver to Gertrude McCann a promissory note in the amount of \$106,000.

23. After the September 6, 2000 Board Meeting, the Corporation prepared the promissory note from the Corporation to Gertrude McCann in the amount of \$106,000 payable in five annual installments with interest at 7.5% per annum. As of December 31, 2000, the balance owed to the Corporation by Gertrude McCann was \$115,987. It was the intent of the Board that Gertrude would issue a promissory note to the Corporation as evidence of her obligation since the Corporation had already prepared its promissory note for the unpaid rent.

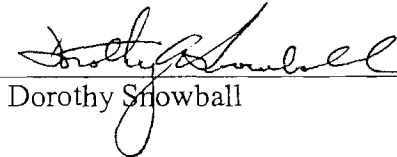
24. Although Gary Meisner and I discussed the notes in 2002, no action was taken to get the promissory note signed by Gertrude until 2006. As of December 31, 2005 the balance owed by Gertrude to the Corporation was \$165,341. On April 26, 2006, I wrote a letter to William V. McCann, Jr., suggesting that the promissory notes be amortized over a five year term to minimize the tax effect on Gertrude. I enclosed amortization schedules showing the annual

payments for the five years beginning August 1, 2006. I used interest at 7.5% on the rent since this was the same rate that was being paid on the ranch/residence purchase contract. I used 6% on the note due to the Corporation because that is the rate that was always used. I also suggested that Gertrude and the Corporation trade checks each year. This was not been done until December of 2009. A copy of my letter to Mr. William V. McCann, Jr. with the amortization schedules is attached to this Affidavit marked Exhibit I.

25. In 2006, Gertrude signed the note from her to the Corporation in the amount of \$165,341. Since the date of the note, the Corporation has kept track of the accrued interest and the ongoing payments that are advanced for Gertrude's personal expenses. Thus, the Corporation holds a promissory note from Gertrude and has an account receivable from Gertrude that are now reflected in the financial statements of the Corporation. The promissory note from the Corporation to Gertrude was not posted to the books of the Corporation prior to December of 2009 because I was waiting until Gertrude and the Corporation traded checks, at which time I would post the payment as a deductible rent expense of the Corporation. I have since instructed the Corporation to post the promissory note payable on the books of the Corporation and treat it as a deductible rent expense for the year 2009.

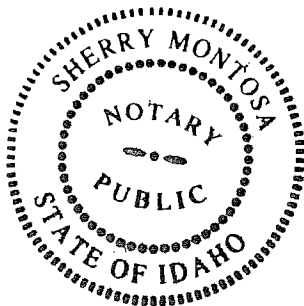
26. It is my understanding that Plaintiff seeks dissolution of the Corporation and a distribution of assets of the Corporation to shareholders. It is my opinion that dissolution of the corporation and the distribution of assets of the Corporation to shareholders in redemption of stock would have potentially devastating tax consequences to the Corporation and shareholders

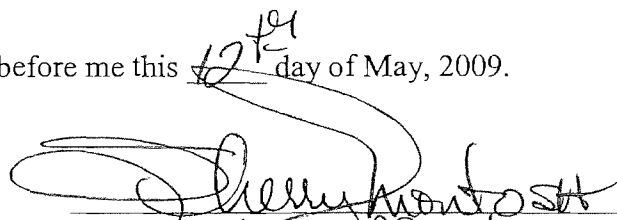
because of the appreciation of the value of those assets in excess of its book value and because the distribution of assets would be treated as a sale of such assets by the Corporation.


Dorothy Snowball

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 12th day of May, 2009.




Name: Sherry Montosa
Notary Public for Idaho
Residing at Meridian, Ada County
My commission expires 9/13/15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of January, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF DOROTHY SNOWBALL by the method indicated below, and addressed to each of the following:

Timothy Esser
ESSER & SANDBERG, PLLC
520 East Main Street
Pullman, WA 99163
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy: 509.334.2205

Andrew Schwam
SCHWAM LAW FIRM
514 South Polk, #6
Moscow, ID 83843
[Attorneys for Plaintiff]

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☐ Overnight Mail
☒ E-mail
☐ Telecopy

Michael E. McNichols
CLEMENTS BROWN
321 13th Street
P.O. Box 1510
Lewiston, ID 83501-1510
[Attorneys for Defendant Gary Meisner]

☒ U.S. Mail, Postage Prepaid
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☐ Overnight Mail
☒ E-mail
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Merlyn W. Clark, ISB No. 1026
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Defendant William V. McCann, Jr.]

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☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy: 208.336.6912



Chas. F. McDevitt

EXHIBIT A

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

DOROTHY ANN SNOWBALL, CPA
RESUME

EDUCATION

Woodbury College
Los Angeles CA

Degree – Bachelor of Business
Administration
Major - Accounting
Honors - Phi Gamma Kappa-
Cum Laude
Graduated August 11, 1961

LICENSES

Idaho Certified Public Accountant
Certificate Number CP-1015
Issued June 21, 1977

Colorado Certified Public Accountant
Certificate Number 23388
Issued October 15, 2004

EXPERIENCE

Dorothy Ann Snowball, CPA
PO Box 1838
Boise ID 83701

Sole practitioner, March 1981 to
present
Over 600 individual, partnership,
and small corporation clients
Sold majority of practice in November
2004, retaining approximately 100
clients

Management Accounting, Inc.
PO Box 2597
Boise ID 83701

October 1977-February 1981
August 1982-November 1989
Manager of tax division
Purchased practice in November 1989

Franklin Oil Company
Caldwell ID

June 1981-August 1982
Controller

Becker CPA Review Course of
California
Encino CA

January 1971-April 1977
Corporate Secretary-Controller

Touche Ross & Company
Los Angeles CA

October 1961-October 1968
Senior staff auditor

ORGANIZATIONS

Idaho Society of Certified Public Accountants
Idaho Association of Public Accountants

Member
Member

EXHIBIT B

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

**MC CANN RANCH
INCOME STATEMENT
For The Period**

January 01, 2002
to

December 31, 2002

CONFIDENTIAL

SALES

Rental Income-Staples	\$ 229,768.61
Rental Income-CitiFinancial	18,172.00
Rental Income-Shopko	190,135.21
Rental Income-Tidyman's	75,471.00
Rental Income-Corral West	61,770.00
Rental Income-Fashion Bug	105,570.00
Rental Income-TCI	62,200.00
Rental Income-Hollywood Video	124,704.57
Rental Income-24th Street	6,325.00
Rental Income - Edward Jones	16,172.88
Rental Income-Key Bank	103,775.04
Rental Income-Shari's	123,399.48
Rental Income-Big 5	121,400.04
Rental Income - Bovill	2,250.00
Interest income	8,038.23
Dividend Income	976.82
Sale of cattle	89,772.35
Sale of bulls	3,936.11
Sale of timber	<u>295,216.51</u>
 Total SALES	 \$ <u>1,639,053.85</u>
 Total GROSS PROFIT	 \$ 1,639,053.85

GENERAL & ADMINISTRATIVE

Advertising	\$ 208.22
Depreciation	259,058.00
Dues & Subscriptions	238.70
Gasoline expense	23,279.07
Utilities-Stewart Ave	7,304.20
Utilities-River Ranch	1,595.66
CAM- Big 5	1,140.00
Thain Grade Center/Common fees	6,099.45
Utilities-24th	838.75
Utilities-TCI	111.80
CAM Charges-Staples	4,250.83
CAM Charges-Shari's	205.88
CAM Charges & Utilities -KBS	4,746.60
CAM Charges-Hollywood Video	3,286.13
Insurance	39,008.00

MC CANN RANCH
INCOME STATEMENT
For The Period

	January 01, 2002 to December 31, 2002
Interest	\$ 503,703.97
Legal fees	26,363.22
Accounting fees	1,125.40
Miscellaneous Expense	5,588.95
Office Expense	5.35
Logging expenses	22,364.18
Postage Expense	1,570.26
Repairs & Maintenance	103,134.19
Repairs-24th St	11.55
Small tools expense	451.00
Supplies Expense	28,360.00
Taxes - Real estate	143,872.63
Taxes - Payroll	22,235.57
Licenses-Autos, trucks	1,474.11
Telephone	6,210.95
Travel & lodging	3,091.06
Meals & entertainment	2,062.66
Salaries	238,427.75
Contract labor	16,085.15
Fertilizer	1,669.81
Hay, straw & feed	59,202.98
Branding - Horseshoer	822.43
Veterinarian	13,678.41
Donations	8,243.10
Political donations	200.00
Real estate commissions	7,973.18
Penalties	750.00
State income tax exp	20.00
Development expenses	<u>2,515.10</u>
Total GENERAL & ADMINISTRATIVE	\$ <u>1,572,584.25</u>
Total NET OPERATING INCOME (LOSS)	\$ 66,469.60

09/12/2003

MC CANN RANCH
INCOME STATEMENT
For The Period

02:01:17 PM

January 01, 2002
to
December 31, 2002

OTHER (INCOME) AND EXPENSES

Gain on sale of fixed assets	\$ (3,295.00)
Total OTHER (INCOME) AND EXPENSES	\$ (3,295.00)
NET INCOME (LOSS) BEFORE TAX	\$ 69,764.60
NET INCOME (LOSS)	\$ 69,764.60 =====

EXHIBIT C

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

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MC CANN RANCH
INCOME STATEMENT
For The Period

CONFIDENTIAL

January 01, 2003
to
December 31, 2003

SALES

Rental Income-Staples	\$ 213,800.07
Rental Income-CitiFinancial	24,764.00
Rental Income-Shopko	190,136.97
Rental Income-Tidyman's	89,193.00
Rental Income-Corral West	64,842.00
Rental Income-Fashion Bug	9,495.00
Rental Income-TCI	63,600.00
Rental Income-Hollywood Video	128,445.90
Rental Income-24th Street	7,150.00
Rental Income - Edward Jones	14,151.48
Rental Income-Key Bank	112,592.10
Rental Income-Shari's	124,850.04
Rental Income-Big 5	121,400.04
Rental Income - Bovill	4,500.00
Interest income	9,706.47
Sale of cattle	150,671.16
Sale of bulls	882.06
Sale of timber	108,955.85
Miscellaneous	<u>342.00</u>

Total SALES \$ 1,439,478.14

Total GROSS PROFIT \$ 1,439,478.14

GENERAL & ADMINISTRATIVE

Advertising	\$ 240.83
Depreciation	279,484.66
Dues & Subscriptions	416.15
Equipment rental	82.90
Gasoline expense	21,008.66
Utilities-Stewart Ave	6,674.09
Utilities-River Ranch	529.79
CAM- Big 5	1,419.65
Thain Grade Center/Common fees	(14,619.26)
Utilities-24th	839.20
Utilities-TCI	156.52
CAM Charges-Staples	7,615.31
CAM Charges-Shari's	(2,603.11)
CAM Charges & Utilities -KBS	5,630.28
CAM Charges-Key Bank Bldg	(68,589.16)

**MC CANN RANCH
INCOME STATEMENT
For The Period**

January 01, 2003
to
December 31, 2003

Insurance	\$ 39,783.00
CAM Charges-H Video	3,407.87
Interest	477,839.91
Legal fees	15,171.04
Accounting fees	985.50
Other Professional Fees	2,750.00
Miscellaneous Expense	6,470.49
Office Expense	675.46
Postage Expense	372.69
Repairs & Maintenance	116,216.74
Repairs-24th St	1,237.29
Small tools expense	259.19
Supplies Expense	18,464.47
Taxes - Real estate	163,867.46
Taxes - Payroll	13,964.65
Licenses-Autos, trucks	2,177.78
Telephone	6,014.96
Travel & lodging	870.96
Meals & entertainment	2,944.21
Salaries	216,418.00
Contract labor	3,085.00
Fertilizer	6,556.68
Hay, straw & feed	48,962.17
Branding - Horseshoer	1,182.36
Veterinarian	15,933.77
Timber expenses	16,307.02
Donations	8,010.00
Real estate commissions	7,973.18
Federal income tax exp	19,714.81
State income tax exp	<u>6,039.00</u>
 Total GENERAL & ADMINISTRATIVE	 \$ <u>1,461,942.17</u>
 Total NET OPERATING INCOME (LOSS)	 \$ (22,464.03)

09/15/2004

MC CANN RANCH
INCOME STATEMENT
For The Period

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January 01, 2003
to
December 31, 2003

OTHER (INCOME) AND EXPENSES

Other Income	\$ (150,139.16)
Gain on sale of fixed assets	<u>(1,485.00)</u>

Total OTHER (INCOME) AND EXPENSES	\$ <u>(151,624.16)</u>
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NET INCOME (LOSS) BEFORE TAX	\$ <u>129,160.13</u>
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NET INCOME (LOSS)	\$ 129,160.13 =====
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EXHIBIT D

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

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MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2004

to

December 31, 2004

CONFIDENTIAL

SALES

Rental Income-Staples	\$ 252,672.81
Rental Income-CitiFinancial	24,384.00
Rental Income-Shopko	188,629.61
Rental Income-Tidyman's	82,332.00
Rental Income-Corral West	64,842.00
Rental Income-Cable One	63,600.00
Rental Income-Hollywood Video	125,017.60
Rental Income-24th Street	6,650.00
Rental Income-Edward Jones	13,747.20
Rental Income-Sterling Bank	132,101.64
Rental Income-Shari's	129,309.16
Rental Income-Big 5	121,400.04
Rental Income - Bovill	2,250.00
Rent on Equipment	2,500.00
Interest income	9,512.34
Patronage Dividend Income	12.81
Sale of cattle	121,788.12
Sale of bulls	6,724.86
Sale of timber	77,576.53
Miscellaneous	<u>136.58</u>

Total SALES \$ 1,425,187.30

Total GROSS PROFIT \$ 1,425,187.30

SELLING EXPENSES

Commissions \$ 7,973.18

Total SELLING EXPENSES \$ 7,973.18

GENERAL & ADMINISTRATIVE

Salaries and Wages	\$ 80,927.25
Payroll tax expense	16,193.23
Insurance - Workmans Comp	5,260.00
Employee Benefits	40.20
Officers Salaries	144,000.00
Advertising	220.38
Bank service charges	97.49
Depreciation	245,320.00

**MC CANN RANCH
INCOME STATEMENT
For The Period**

January 01, 2004
to
December 31, 2004

Dues & Subscriptions	\$ 773.11
Equipment rental	240.00
Escrow Fees	60.00
Fuel	22,121.17
Vehicle Expense	2,794.95
Utilities-Stewart Ave	7,264.11
Utilities-River Ranch	805.67
CAM- Big 5	1,919.00
Utilities-24th	843.83
Utilities-TCI	271.29
CAM Charges-Staples	4,134.45
CAM Charges-Shari's	125.00
CAM Charges & Utilities -KBS	4,483.56
CAM Charges-Sterling Bank	80.00
Insurance	24,798.25
Utilities-KBS-STE 101	72.72
Utilities-KBS-STE102	72.72
CAM Charges-H Video	6,259.77
CAM Charges - Cable One	765.00
CAM Charges - Corral West F/B	3,918.39
CAM Charges - Shopko	450.00
CAM Charges - Tidyman's	962.50
Interest Expense	422,344.58
Legal fees	3,874.69
Accounting fees	974.13
Miscellaneous Expense	1,705.88
Office Expense	7,200.00
Office Supplies	387.13
Postage Expense	1,541.72
Repairs & Maintenance	77,785.61
Repairs-24th St	205.10
Equipment Cleaning & Maintenance	1,132.50
Supplies Expense	16,610.39
Taxes - Real estate	164,806.41
Licenses and Permits	1,929.94
Telephone	4,236.10
Utilities	6,357.68
Travel & lodging	1,378.01
Meals & entertainment	1,984.54
Contract labor	8,026.88
Fertilizer	3,110.34
Hay, straw & feed	53,691.76
Branding - Horseshoer	1,273.81

MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2004
to
December 31, 2004

Veterinarian	\$	18,938.79
Timber expenses		5,016.87
Seed		4,530.00
Donations		6,682.50
Political donations		150.00
Penalties		561.70
Federal income tax exp		4,927.19
State income tax exp		<u>2,422.00</u>
Total GENERAL & ADMINISTRATIVE	\$	<u>1,399,060.29</u>
Total NET OPERATING INCOME (LOSS)	\$	18,153.83
OTHER (INCOME) AND EXPENSES		
Gain on sale of fixed assets	\$	<u>(5,026.86)</u>
Total OTHER (INCOME) AND EXPENSES	\$	<u>(5,026.86)</u>
NET INCOME (LOSS) BEFORE TAX	\$	<u>23,180.69</u>
NET INCOME (LOSS)	\$	<u>23,180.69</u> =====

EXHIBIT E

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

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**MC CANN RANCH
INCOME STATEMENT
For The Period**

CONFIDENTIAL

January 01, 2005
to
December 31, 2005

SALES

Rental Income-Shopko	\$ 190,972.21
Rental Income-Tidyman's	82,332.00
Rental Income-Corral West	64,842.00
Rental Income-Cable One	70,989.32
Rental Income-Hollywood Video	128,556.00
Rental Income-24th Street	7,300.00
Rental Income-Edward Jones	14,423.85
Rental Income-Sterling Bank	117,830.90
Rental Income-Shari's	130,074.96
Rental Income-Big 5	111,283.37
Rental Income - Bovill	1,000.00
Rental Income-KBS-Citi-Financi	24,384.00
Rental Income-Dollar Tree	38,700.00
Rental Income - Staples	213,800.07
Interest income	9,208.52
Sale of cattle	133,351.51
Sale of bulls	1,633.56
Sale of timber	99,400.34
Miscellaneous	<u>229.60</u>

Total SALES \$ 1,440,312.21

Total GROSS PROFIT \$ 1,440,312.21

GENERAL & ADMINISTRATIVE

Payroll tax expense	\$ 13,945.62
Insurance - Workmans Comp	7,263.00
Employee Benefits	668.84
Advertising	894.45
Cleaning	595.15
Depreciation	262,209.00
Dues & Subscriptions	473.00
Escrow Fees	60.00
Fuel	30,245.38
Vehicle Expense	3,208.58
CAM- Big 5	(64,261.50)
CAM Charges-Staples	24,493.63
CAM Charges-Shari's	(4,354.53)
CAM Charges-Sterling Bank	9,073.91
Insurance	22,538.00

**MC CANN RANCH
INCOME STATEMENT
For The Period**

January 01, 2005
to
December 31, 2005

Utilities-KBS-STE 101	\$ 6,779.35
CAM Charges-H Video	12,589.83
CAM Charges - Cable One	4,416.63
CAM Charges - Corral West F/B	14,251.29
CAM Charges - Shopko	(314.21)
Interest	355,772.00
Legal fees	17,464.38
Accounting fees	940.25
Other Professional Fees	800.00
Miscellaneous Expense	1,898.30
Office Expense	22,800.00
Office Supplies	551.31
Postage Expense	1,122.43
Repairs & Maintenance	79,387.45
Repairs-24th St	316.62
Equipment Cleaning & Maintenance	730.00
Repairs - Bovill	21.30
Equipment repairs	223.00
General repairs	29.40
Repairs - Stewart Ave Property	5,702.25
Supplies Expense	18,254.01
Taxes - Real estate	107,964.42
Licenses and Permits	3,549.36
Telephone	3,640.00
Utilities - Stewart Ave.	6,285.37
Utilities - River Ranch	648.99
Utilities - 24th	777.61
Utilities - Bovill	267.30
Utilities - Cable One	256.85
Utilities - Cache Ranch	216.98
Utilities - Corral West	1,701.82
Utilities - Fashion Bug	685.78
Utilities - KBS	2,959.43
Utilities - KBS Ste 101	72.79
Utilities - KBS- Suite 102	72.72
Travel & lodging	2,820.67
Meals & entertainment	2,578.19
Salaries	81,356.50
Officer Salary	144,000.00
Contract labor	8,485.00
Fertilizer	431.58
Hay, straw & feed	32,660.14
Branding - Horseshoer	1,329.93
Veterinarian	11,229.96

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MC CANN RANCH
INCOME STATEMENT
For The Period

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	January 01, 2005 to December 31, 2005
Timber expenses	\$ 6,809.26
Donations	6,132.50
Political donations	300.00
Real estate commissions	9,473.18
Penalties	458.22
Federal income tax exp	35,505.00
State income tax exp	<u>10,545.00</u>
Total GENERAL & ADMINISTRATIVE	\$ <u>1,334,002.67</u>
Total NET OPERATING INCOME (LOSS)	\$ <u>106,309.54</u>
NET INCOME (LOSS) BEFORE TAX	\$ <u>106,309.54</u>
NET INCOME (LOSS)	\$ <u>106,309.54</u> =====

EXHIBIT F

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

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MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2006
to
December 31, 2006

SALES

CONFIDENTIAL

Rental Income-Shopko	\$	187,115.28
Rental Income-Tidyman's		75,471.00
Rental Income-Corral West		69,450.00
Rental Income-Cable One		63,600.00
Rental Income-Hollywood Video		128,556.00
Rental Income-24th Street		6,721.00
Rental Income-Edward Jones		15,371.16
Rental Income-Sterling Bank		120,540.99
Rental Income-Shari's		137,475.00
Rental Income-Big 5		122,411.70
Rental Income - Bovill		1,150.00
Rental Income-KBS-Citi-Financi		28,158.96
Rental Income-Dollar Tree		88,200.00
Rental Income - Staples		233,236.44
Interest income		16,520.74
Patronage Dividend Income		91.82
Sale of cattle		197,878.40
Sale of timber		107,704.00
Total SALES	\$	1,599,652.49
Total GROSS PROFIT	\$	1,599,652.49

GENERAL & ADMINISTRATIVE

Insurance - Workmans Comp	\$	7,813.00
Employee Benefits		695.00
Advertising		161.78
Bank service charges		154.98
Cleaning		80.00
Depreciation		278,452.00
Dues & Subscriptions		819.10
Escrow Fees		60.00
Fuel		30,253.61
CAM- Big 5	(	1,332.81)
CAM Charges-Staples	(	185,940.25)
CAM Charges-Shari's		12,322.37
CAM Charges & Utilities -KBS		17,922.77
CAM Charges-Sterling Bank	(	17,621.33)
Insurance		22,831.00
CAM Charges-H Video		21,482.99

MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2006
to
December 31, 2006

CAM Charges - Cable One	\$ 176.37
CAM Charges - Corral West F/B	18,783.05
CAM Charges - Shopko	(560.79)
CAM Charges - Tidymans	48.00
Interest	327,702.28
Legal fees	7,448.31
Accounting fees	1,249.29
Other Professional Fees	3,260.00
Miscellaneous Expense	737.98
Office Expense	14,400.00
Office Supplies	352.44
Logging expenses	5,209.25
Postage Expense	1,167.80
Vehicle repairs	9,497.08
Repairs & Maintenance	14,171.98
Repairs-24th St	795.83
Equipment Cleaning & Maintenance	1,650.91
Repairs - Bovill	529.72
General repairs	34,014.18
Repairs - Stewart Ave Property	5,500.00
Supplies Expense	25,702.32
Taxes - Real estate	66,694.24
Taxes - Payroll	16,172.34
Licenses and Permits	1,697.97
Telephone	3,509.24
Utilities - Stewart Ave.	6,206.47
Utilities - River Ranch	665.20
Utilities - 24th	1,019.35
Utilities - Bovill	545.74
Utilities - Cable One	280.71
Utilities - Cache Ranch	181.31
Utilities - Corral West	2,391.03
Utilities - KBS	3,712.64
Utilities - KBS Ste 101	80.34
Utilities - KBS- Suite 102	78.93
Travel & lodging	2,883.72
Meals & entertainment	3,826.77
Salaries	80,195.25
Officer Salary	144,000.00
Contract labor	18,879.75
Fertilizer	1,934.46
Hay, straw & feed	71,624.48
Branding - Horseshoer	1,810.40
Veterinarian	12,362.19

MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2006
to
December 31, 2006

Seed	\$ 3,170.00
Donations	6,175.00
Political donations	100.00
Real estate commissions	11,573.18
Penalties	304.32
Federal income tax exp	154,425.00
State income tax exp	<u>37,314.00</u>
Total GENERAL & ADMINISTRATIVE	\$ <u>1,313,804.24</u>
Total NET OPERATING INCOME (LOSS)	\$ 285,848.25
OTHER (INCOME) AND EXPENSES	
Gain on sale of fixed assets	\$ <u>(23,219.00)</u>
Total OTHER (INCOME) AND EXPENSES	\$ <u>(23,219.00)</u>
NET INCOME (LOSS) BEFORE TAX	\$ <u>309,067.25</u>
NET INCOME (LOSS)	\$ 309,067.25 =====

EXHIBIT G

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

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MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2007
to
December 31, 2007

SALES

Rental Income-Staples	\$ 235,564.24
Rental Income-CitiFinancial	26,965.84
Rental Income-Shopko	189,313.29
Rental Income-Tidyman's	84,140.00
Rental Income-Corral West	67,000.00
Rental Income-Cable One	71,600.00
Rental Income-Hollywood Video	123,372.29
Rental Income-24th Street	7,500.00
Rental Income-Edward Jones	15,371.16
Rental Income-Sterling Bank	123,313.45
Rental Income-Shari's	137,475.00
Rental Income - Sally's Beauty	30,785.91
Rental Income-Big 5	133,539.96
Rental Income-Dollar Tree	88,200.00
Interest income	15,101.49
Patronage Dividend Income	100.89
Sale of Calves	23,464.01
Sale of steers	108,841.09
Sale of cattle	15,982.00
Miscellaneous	<u>1,159.00</u>
Total SALES	\$ <u>1,498,789.62</u>
Total GROSS PROFIT	\$ 1,498,789.62

GENERAL & ADMINISTRATIVE

Salaries and Wages	\$ 92,001.50
Insurance - Workmans Comp	9,069.00
Employee Benefits	2,220.11
Officers Salaries	159,999.96
Advertising	151.95
Bank service charges	26.00
Depreciation	297,936.00
Dues & Subscriptions	590.84
Equipment rental	262.50
Fuel	30,314.79
Vehicle Expense	16,822.54
Automobile Expense	2,070.17
Utilities-Stewart Ave	6,744.40
CAM- Big 5	(2,886.98)

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MC CANN RANCH
INCOME STATEMENT
For The Period

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January 01, 2007
to
December 31, 2007

Utilities-24th	\$ 811.28
CAM Charges-Staples	443.47
CAM Charges-Shari's	(1,611.56)
CAM Charges & Utilities -KBS	23,042.03
CAM Charges-Sterling Bank	(1,500.65)
Insurance	38,562.26
Utilities-KBS-STE 101	64.60
Utilities-KBS-STE102	224.55
CAM Charges-H Video	22,434.57
CAM Charges - Cable One	(116.53)
CAM Charges - Corral West F/B	21,079.93
CAM Charges - Shopko	113.53
CAM Charges - Tidyman's	1,212.60
Interest	12,978.27
Interest: Loan Interest	289,189.48
CAM charges	500.00
CAM Charges-Sally's Beauty	(622.04)
Legal fees	52,935.03
Accounting fees	2,155.70
Other Professional Fees	363.00
Miscellaneous Expense	1,306.83
Printing & Reproduction	369.77
Office Expense	15,600.00
Office Supplies	644.78
Postage Expense	1,016.03
Repairs & Maintenance	1,064.74
Repairs-24th St	52.00
Equipment Cleaning & Maintenance	1,051.28
Repairs - Bovill	1,717.65
Equipment repairs	13,805.34
General repairs	14,438.64
Repairs - Stewart Ave Property	11,214.94
Computer repairs	466.55
Supplies Expense	13,891.76
Taxes - Real estate	82,847.22
Taxes - Other	40.15
Taxes - Payroll	16,646.60
Licenses and Permits	1,842.47
Telephone	3,484.21
Utilities: 6th St Water	138.86
Utilities: Spiral Hwy	145.14
Utilities: Tidyman's	7,974.02
Utilities - River Ranch	730.05
Utilities - Bovill	430.21

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

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MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2007
to
December 31, 2007

Utilities - Cable One	\$ 284.85
Utilities - Corral West	1,568.15
Utilities - KBS	4,310.66
Travel & lodging	1,613.99
Meals & entertainment	2,085.32
Contract labor	15,884.75
Fertilizer	1,954.65
Hay, straw & feed	86,190.81
Branding - Horseshoer	711.58
Veterinarian	9,482.84
Donations	7,447.05
Political donations	400.00
Real estate commissions	13,026.68
Penalties	633.37
Federal income tax exp	22,370.00
State income tax exp	<u>8,149.00</u>
Total GENERAL & ADMINISTRATIVE	\$ <u>1,444,615.24</u>
Total NET OPERATING INCOME (LOSS)	\$ 54,174.38
OTHER (INCOME) AND EXPENSES	
Gain on sale of fixed assets	\$ (16,500.00)
Gain on Sale of Livestock	<u>(5,191.39)</u>
Total OTHER (INCOME) AND EXPENSES	\$ <u>(21,691.39)</u>
NET INCOME (LOSS) BEFORE TAX	\$ <u>75,865.77</u>
NET INCOME (LOSS)	\$ <u>75,865.77</u> =====

EXHIBIT H

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2008
to
December 31, 2008

CONFIDENTIAL

SALES

Rental Income-Staples	\$	261,170.04
Rental Income-CitiFinancial		32,678.53
Rental Income-Shopko		188,145.08
Rental Income-Tidyman's		87,089.00
Rental Income-Corral West		59,268.75
Rental Income-Cable One		73,200.00
Rental Income-Hollywood Video		133,739.71
Rental Income-24th Street		7,500.00
Rental Income-Edward Jones		18,620.04
Rental Income-Sterling Bank		126,149.66
Rental Income-Shari's		125,505.76
Rental Income - Sally's Beauty		37,375.99
Rental Income-Big 5		137,504.85
Rental Income-Dollar Tree		82,648.68
Rental Income - Cell Tower		6,775.00
Interest income		9,449.27
Patronage Dividend Income		253.31
Sale of Calves		103,968.83
Sale of steers		10,086.51
Sale of cattle		18,401.03
Sale of bulls		6,184.16
Sale of timber		77,558.37
Total SALES	\$	<u>1,603,272.57</u>
Total GROSS PROFIT	\$	1,603,272.57

GENERAL & ADMINISTRATIVE

Salaries and Wages	\$	94,255.75
Insurance - Workmans Comp		11,503.00
Employee Benefits		1,118.08
Officers Salaries		174,999.96
Bank service charges		105.53
Cleaning		631.00
Depreciation		205,575.00
Dues & Subscriptions		624.00
Equipment rental		345.23
Fuel		38,505.32
Vehicle Expense		2,586.45
Automobile Expense		8,713.72

MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2008
to
December 31, 2008

Utilities-Stewart Ave	\$ 5,816.21
CAM- Big 5	12,997.91
Utilities-24th	881.75
CAM Charges-Staples	1,014.02
CAM Charges-Shari's	1,500.00
CAM Charges & Utilities -KBS	(8,432.84)
CAM Charges-Sterling Bank	(1,299.66)
Insurance	38,441.62
CAM Charges-H Video	27,860.52
CAM Charges - Cable One	(151.88)
CAM Charges - Corral West F/B	20,279.36
CAM Charges - Tidyman's	29,209.05
Interest	12,770.69
Interest: Loan Interest	264,646.71
CAM Charges-Sally's Beauty	561.60
CAM Charges - Other	2,768.00
Legal fees	92,423.90
Accounting fees	1,150.75
Other Professional Fees	5,050.00
Miscellaneous Expense	2,002.21
Printing & Reproduction	222.32
Rent	1,500.00
Office Expense	14,400.00
Office Supplies	137.73
Postage Expense	616.37
Repairs & Maintenance	8,703.52
Equipment Cleaning & Maintenance	607.06
Repairs - Bovill	418.24
Equipment repairs	18,275.42
General repairs	12,520.83
Repairs - Stewart Ave Property	13,139.25
Small tools expense	560.00
Supplies Expense	25,632.03
Taxes - Real estate	49,046.58
Taxes - Payroll	17,973.92
Licenses and Permits	1,829.50
Telephone	3,811.83
Utilities: 6th St Water	108.60
Utilities: Spiral Hwy	205.48
Utilities: Tidyman's	7,967.34
Utilities - River Ranch	550.88
Utilities - Bovill	1,214.95
Utilities - Cable One	239.92
Utilities - Corral West	1,470.51

MC CANN RANCH
INCOME STATEMENT
For The Period

January 01, 2008
to
December 31, 2008

Utilities - KBS	\$	3,835.02
Travel & lodging		1,905.91
Meals & entertainment		2,673.56
Contract labor		9,419.75
Fertilizer		9,474.97
Hay, straw & feed		107,767.29
Branding - Horseshoer		415.96
Veterinarian		9,833.26
Donations		6,279.00
Real estate commissions		14,568.52
Penalties		2,197.65
Federal income tax exp		63,120.00
State income tax exp		16,828.00
Total GENERAL & ADMINISTRATIVE	\$	<u>1,477,924.13</u>
Total NET OPERATING INCOME (LOSS)	\$	125,348.44
OTHER (INCOME) AND EXPENSES		
Gain on sale of fixed assets	\$	(12,750.00)
Gain on Sale of Livestock		<u>(41.18)</u>
Total OTHER (INCOME) AND EXPENSES	\$	<u>(12,791.18)</u>
NET INCOME (LOSS) BEFORE TAX	\$	<u>138,139.62</u>
NET INCOME (LOSS)	\$	<u>138,139.62</u> =====

EXHIBIT I

AFFIDAVIT OF DOROTHY SNOWBALL IN SUPPORT OF DEFENDANT MCCANN
RANCH'S MOTION FOR SUMMARY JUDGMENT

Dorothy Ann Snowball
Certified Public Accountant

(208) 890-3287
Colorado (970) 565-6787
Fax (208) 361-6730

PO Box 1838
Boise, ID 83701-1838
Home (208) 387-0218

April 26, 2006

Mr. Bill McCann Jr.
McCann Ranch & Livestock Co.
Box 445
Lewiston ID 83501

*Mike McNichols - atty.
(208) 774-6753 FAX
mynichols@clbmc.com*

Dear Bill,

Well I have finally gotten around to reviewing the correspondence from 2002 regarding the amounts owed the corporation by your mother and the amount the corporation owes her for rent for the 12 ½ years through August 1, 2000.

Obviously the amount due from your mother has increased over the years, attributable mainly to charges for gasoline and telephone and interest charged on the loan balance. At December 31, 2000, the balance was \$115,987 and at December 31, 2005, the balance was \$165,341.

The rent balance was \$106,000 as of August 1, 2000, but there would be interest due from that date.

My proposal would again be a five-year payout to minimize the tax effect on Gertrude. Enclosed are amortization schedules showing the annual payments for the five years beginning August 1, 2006. As you will note, they are virtually a wash. I have used interest at 7.5% on the rent since this is the same rate that is being paid on the ranch purchase contract, which will be paid in full in 2006. We have been using a 6% rate on the amounts due the corporation from Gertrude and I kept the interest rate at that level.

It would be best if you actually wrote checks annually, on August 1st, to pay these amounts. Gertrude would write a check to the corporation for \$38,422.18 and the corporation would write her a check for \$38,342.18. We will have to adjust Gertrude's payments to the corporation each year by the additional amounts that the corporation pays on her behalf for telephone and fuel, etc.

Bill McCann Jr.
April 26, 2006
Page 2

Gary Meisner and I discussed this plan back in 2002 and he had no problem with it then. You had intended to have Chuck McDevitt prepare the appropriate loan documents and he was apprised of this back in February 2002. I don't know if he is still representing the corporation or if someone else would need to prepare these documents at this time. Of course, minutes would also have to be prepared to cover the transactions and update the minutes from 2000 discussing the rent payable and offset of liabilities (copy enclosed).

Please let me know if this makes sense or if you have any questions.

Very truly yours,

Dorothy Ann Snowball

Encl.